Rodolfo Herrera-Mena
A# 92-878-235
El Centro Processing Center
El Centro, CA 92243
Pro Se

FILED
MAR 14 2008
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

RODOLFO HERRERA-MENA [A# 92-878-235] Petitioner, Vs. MICHAEL CHERTOFF, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, MICHAEK MUKASEY, ATTORNEY GENERAL, ANTHONY J. CERONE, DIRECTOR OF SAN DIEGO FIELD OFFICE, U.S . IMMIGRATION AND CUSTOM ENFORCEMENT, ROBERT G. RILLIAMAS, OFFICER – IN – CHARGE, EL CENTRO SERVICE PROCESSING CENTER. Respondents,	**CIVIL ACTION NO:** '08 CV 0481 J LSP **PETETION FOR WRIT OF HABEAS CORPUS** **[28 U.S.C & 2241].**

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U. S. C. 2241

Petitioner, Rodolfo Herrera-Mena, hereby petitions this Court for a writ of habeas corpus to remedy Petitioner's unlawful detention by Respondents. In support of this petition and complaint for injunctive relief, Petitioner alleges as follows:

CUSTODY

1. Petitioner is in the physical custody of Respondent and the department of Homeland Security ("DHS") former Immigration and Naturalization Service (INS). Petitioner is detained at the El Centro Service Processing Center / California, part of Department of Homeland Security DHS. Petitioner is under the direct control of Respondent and their agents.

JURISDICTION

2. This action arises under the Constitution of the United States, and the Immigration and Nationality Act ("INA"), 8 U. S. C. § 1101 et seq., as amended by the Illegal Immigration Reform and Immigrant Responsibility Act Of 1996 (IIRIRA), Pub L. No. 104 – 208, 110 Stat. 1570, and the Administrative Procedure Act ("APA"), 5 U. S. C. § 701 et seq.

3. This Court has jurisdiction under 28 U. S. C. § 2241; art. I § 9, cl. 2 of the United Sates Constitution ("Suspension Clause"); and 28 U. S. C. § 1331, as Petitioner is presently in custody under color of the authority of the United States, and such custody is in violation of the Constitution, laws, or treaties of the United Sates. This court may grant relief pursuant to 28 U. S. C. § 2241 5 U. S.C. § 702, and the All writs Act, 28 U. S.C. § 1651. This Court also has jurisdiction over this case and these issued pursuant to 28 U.S.C § 1331. Constitutional and federal law governing immigration establishes subject-matter jurisdiction. 28 U.S.C. § 2241 gives the district court jurisdiction to grant relief when a person is detained in violation of the constitution or federal law **Magna-Pizano v Reno** 144 F. 3d 603, 610 (9th Cir.2000) (citations omitted): **Goncalves v. Reno** 144 F.3d 110, 119 (1st Cir 1998). **In Reno v. American-Arab Anti-Discrimination Committee**, 525 U. S. 471, 482, 83 (1999), the Supreme court makes that this habeas petition is not barred by 8 USC 1252 (g). Jurisdiction also extends to final orders of deportation, despite changes in immigration law regarding judicial scrutiny enacted in 1996. See INS v. Cyr, 533 US 289 314 92001). **Bravo v. Ashcroft**, 341 F. 3d 590, 592-93 (5th Cir. 2003), **Zadyvas v Underdown**, 185 F.3d 279 (5thCir.) stated "that federal courts retain jurisdiction to

review statutory and constitutional claims" as well as to hear challenge to continue detention of deportable immigrant. **Zadyvas v. Davis** 533 US. 682, 687. The court therefore, has every right to hear Mr. Rodolfo Herrera-Mena's claim. Also this court has jurisdiction under **Tijani v. Willis**, 430 F.3d 1241 (9th Cir. 2005) and **Nadarajah v. Gonzales**, 443 F. 3d 1069 (9th Cir. 2006)

4. Petitioner has exhausted any and all administrative remedies to the extent required by law.

VENUE

5. Pursuant to **Braden v. 30th Judicial Circuit Court of Kentucky,** 410 U. S. 484, 493-500 (1973), venue lies in the United States District Court for the Southern District of California, the judicial district in which Petitioner resides.

PARTIES

6. Petitioner is a native and citizen of Mexico. Petitioner was first taken into BICE custody on March 19, 2007 the, and has remained in BICE custody continuously since that date. Petitioner was ordered removed on May 9, 2007.

7. Respondent Michael Chertoff, is the secretary of Department of Homeland Security (DHS), and is responsible for the administration of the DHS and implementation and enforcement of the Immigration & Naturalization Act (A-I.N.A). As Mr. Chertoff has ultimate custodian authority over Petitioner.

8. Respondent Michael Mukasey, is the Attorney General of the United States and is responsible for the administration of the DHS and the implementation and enforcement of the Immigration & Naturalization Act (INA).

9. Respondent Anthony J. Cerone is the District Director of the San Diego Field office of the BICE and is petitioner's immediate custodian **See Vasquez v. Reno**, 233 F. 3d 688, 690 (1st Cir. 200), cert. denied, 122 S. Ct. 43 (2001).

10. Respondent Robert G. Rilliamas is the Commissioner of the BICE. He is responsible for the administration of the BICE and implementation and enforcement of the INA. As such, MR. Rilliamas is the legal custodian of petitioner.

11. Petitioner Rodolfo Herrera-Mena is 48 years old native and citizen of Mexico, entered the United States in 1981 and was granter a lawful permanent resident in 1993.

12. Petitioner was granted a $5,000.00 bond by Deportation Officer Reyna, and was rejected by the Field Office Director of San Diego, Robert Cully, Petitioner was given a (90) days review which was denied .

13. Petitioner submitted a request to the DHS / ICE headquarters Post-Order Detention Unit ('HQPDU') seeking to be released under order of supervision, to this date the ('HQPDU') did not response, and petitioner still in custody.

ARGUMENT

THIS COURT MUST RELEASE THE PETITIONER FROM THE CUSTODY OF THE RESPONDENTS UNDER APPROPRIATE CONDITIONS OF SUPERVISION.

In **Zadvydas v. Davis** 533 U. S. 678 (2001). The Supreme Court in held those six months is the presumptively reasonable period during which INS may detain aliens in order to effectuate their removal. Id. at 702. Interim administrative regulations also recognize that the HQPDU has six-month period for determining whether there is significant likelihood of an alien's removal in the reasonable foreseeable future. 8 C. F.R. 241. 13 (b)(2) (ii).

Petitioner was ordered removed on May 09, 2007, and the removal order became final on May 09, 2007. Therefore, the six-month presumptively reasonable removal period for Petitioner ended on November 09, 2007.

Petitioner appealed the IJ decision to the BIA, which the BIA dismissed his appeal, then Petitioner filed petition for review the BIA's decision to the Court of appeals for the Ninth Circuit case # 07-73671 he was granted a stay of removal pending his appeal.

This is a very thin precedential reed on which respondents would rest a sweeping denial of liberty. Respondents would have this Court uphold an automatic rule of detention co-terminous with any legal challenges the deportee raises. That, however, is not only unfair, but it is not the law of this Circuit.

Ninth Circuit Case Law Supports This Court's Exercise of Discretion in Releasing Deportees from Detention During the Pendency of Colorable Challenges to the Predicate Proceedings Underlying Their Removals.

In **Tijani v. Willis**, 430 F.3d 1241 (9th Cir. 2005), the Court reviewed a § 2241 habeas petition before judge Hayes by deportee who had been held in custody for 32 months awaiting the outcome of his Appeals. Distinguishing **Demore v. Kim**, 538 U.S. 510 (2003), because **Tijani** did not concede he was deportable, the Court ordered his release unless he was provided with a bail hearing and found unsuitable for release under the usual factors of risk of flight or danger to the community. Id. at 1242.

In his concurring opinion, judge Tashima expanded on the reasoning underlying the decision in order to provide guidance to the courts. Id. at 1243 (Tashima, J., concurring). Judge Tashima saw the heart of the case to be a problematic decision, **In re Joseph**, 22 I. & N. Dec. 799 (BIA 1999), which he stated erroneously treated 8 U.S.C. § 1226 (C) as permitting indefinite detention. Id. at 1243-44. Rather, **Zadvydas** made it clear that "[w]hen such a fundamental right [as personal liberty] is at stake, the Supreme Court has insisted on heightened procedural protections to guard against the erroneous deprivation of the right." Id. at 1244. The natural limitation on authority to detain, in Judge Tashima's view, is "[o]nly those immigrants who could not raise a 'substantial' argument against their removability should be subject to mandatory detention. Id. at 1247. Such a standard "strikes the best balance between the alien's liberty interest and the government's interest in regulating immigration." Id. Because **Tijani** had a potentially meritorious claim that his conviction was not a categorical crime of removal turpitude, he made a showing of a "substantial argument" which would warrant release on appeal. Id. at 1247-48. Conversely, those detainees who cannot raise a substantial argument against their deportation have an incentive to flee if not detained, so release is not appropriate. Id. at 1247. Noting the perverse penalizing effect of detention for those who have the best reasons to stay and fight, Judge Tashima observed, "By subjecting immigrants who, like **Tijani**, raise difficult questions of law in their removal proceedings to detention while those proceedings are conducted, the Joseph standard forces those immigrants to endure precidely who **Tijani** has endured: detention that lasts for a prolonged period of months or years." Id. at 1246.

Similarly, In **Nadarajah v. Gonzales**, 443 F. 3d 1069 (9th Cir. 2006), a case brought before Judge Burns, the Court considered an indefinite detainee held under suspicion of terrorist affiliation. **Nadajarah** was seeking to challenge his detention and to support his claim for asylum, but the government relied on the silence of the asylum detention statute to detain Nadajarah while his litigation proceeded. Id. at 1076 -78. However, the Court of Appeals held that the asylum detention statute was equally subject to the strictures of **Zadvydas**. Id. at 1082. Moreover, the Court held the principles of Fed. R. App. Proc. 23(b) allowing release on bail pending appeals apply to such immigration detentions. Id. at 1083. The usual standards operate in such cases: (1) probability of success on merits and irreparable harm; or (2) serious legal question and a balance of the hardships. Id. Moreover, the probability of success correspondingly lessens at the length of detention increases Id. 1083-84. In **Nadarajah**, the Court found the 52 months of detention were great hardship that accordingly reduced the required showing of likelihood of success.

Petitioner's case compares favorably in the fact situation in **Tijani** and **Nadarajah**, and therefore he is equally entitled to consideration for release. Like **Tijani**, petitioner can raise his argument for release through the vehicle of a § 2241 petition, and he too can point to substantial arguments regarding both his predicate criminal conviction and the deportation proceeding.

Petitioner has raised three substantive arguments attacking these predicate proceedings. First, he has argued that he was not subject to the "stop-time" rule, which deprived him of the ability to seek relief from removal. This is because his criminal conviction for possession for sale of controlled substance cocaine was not categorical crimes of an aggravated felony because petitioner was never found with any sales material nor was found with large amount of money during the arrest . Petitioner was convicted by jury trial, and Petitioner is in process to vacate his criminal conviction under petition of habeas corpus under ineffective assistance of counsel, his case is pending in California Supreme Court. please see exhibit (1). If it is not an aggravated felony, then it did not stop time for petitioner to accrue continuous residence, allowing him to apply for discretionary relief under 8 U.S.C § 1229 b (d)(1). Nor would it count as bases for deportation under 8 U.S.C. § 1227(a)(2)(A)(ii). Second, petitioner has argued that he was effected by his counsel during the criminal trial which is violation to his due process and also he was never informed of the immigration consequences after he was convicted by jury trial, his counsel never advised him about his right to appeal the conviction, and the consequences of being deported if he did not appeal in the underlying criminal cases. Under California Law, this is ground of vacating his guilty plea and overturning his conviction. See Cal Penal Code § 1016.5 (imposing statutory duty upon judiciary to warn aliens about immigration consequences of guilty plea); **People v. Gontiz**, 58 Cal. App. 4th 1309 (1997) (court must inform defendant of all immigration consequences as required by statute); **People v. Soriano**, 194 Ca. App. 3d. 1470 (1987) (allowing defendant to attached the conviction for failure to advise of immigration consequences). Third, petitioner was deprived of effective assistance of counsel, his attorney never filed any motion to challenge the search warrant, nor did advise the jury of less charges and the elements of possession for sale during substantial and a critical portion of his criminal proceedings. Any one of these claims would count as a "substantial question" under the Tashima analysis in **Tijani**; together, they show petitioner has reasonable basis for his legal challenges. As Judge Tashima observed, the detainee need not show certainty of outcome to gain release, just that "a closer look is surely required." **Tijani**, 430 F.3d at 1248 (Tashima, J., concurring).

Also in **Nadarajah**, petitioner here can demonstrate a basis for release under the factors in Fed. R. App. P. 23(b). He raises three substantive and complex legal questions. His continued loss of personal liberty in itself constitutes irreparable harm. As for the balance of hardship, whereas the Court in **Nadarajah** found that 52 months detention was very burdensome detention which correspondingly lessened the required showing of likely success on appeal, petitioner here has been in custody since July 29, 2205, and in respondents custody since March 09, 2007. His burden of probable success, too, must be significantly lessened.

Balancing the factors identified in case law for release of detainees while legal challenges are pending, petitioner is entitled to release at least as much as petitioners in **Tijani** and **Nadarajah**.

This Court has recently issued an order in Jesse Mustanish, (aka) Jesse William Alfaro, case #(07 cv 1100 WQH (LSP)) , Joel Judulang, case # (07 cv 1414) and Joes Forrero, case # (N/A).

In Jesse Mustanich, this Court granted the petitioner petition of habeas corpus and ordered that he will be granted a bail ,the Immigration Judge / San Diego granted him a bond , but the DHS appealed the IJ's decision and his case now pending in the BIA..

In Joese Forrero, this Court granted him his petition of habeas corpus, and ordered that he will be given a bail hearing, on March 3, 2008, the IJ granted him a bail, but the DHS appealed the IJ's decision.

In Joel Judulang, this Court granted him his petition of habeas corpus on February 12, 2008,, and ordered to provides him bail hearing within (30) days.

This Court should, grant petitioner his petition of habeas corpus compares to Mustanich, Forrero, and Judulang, because petitioner has merits on his appeal in the Court of appeals, and that he is in process to overturn his criminal conviction, Petitioner is not a flight risk he once was granted a bail by his Deportation Officer Reyna and officer in Charge at El Centro Processing Center, but the Field Office Director denied it due to his criminal conviction .

A Bond of not More Than $1.500 Is Appropriate on the Circumstances of this Case.

Respondents request, in the alternative, that if petitioner is released from their custody, this court order a bond be posted. Petitioner opposes the setting of any financial condition as inappropriate and unnecessary.

In striking down a civil commitment statute which placed the burden on the detainees to prove they were not a danger to the public in order to obtain release, the Supreme Court in **Foucha v. Louisiana**, 504 U.S. 71 (1992), noted that "[I]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Id. at 83, quoting **United States v. Salerno**, 481 U.S. 739, 755 (1987). The Supreme Court likewise relied on **Foucha** and Salerno in **Zadvydas** to hold that indefinite civil confinement of deportees was unacceptable. See 533 U.S. at 690-91.

REQUEST FOR RELIEF

WHEREFORE, The petitioner request that this Honorable Court order the respondents to release him from custody under the condition of supervision set forth in 8 U.S.C § 1231 (a)(3).

Dated: March 10th 2008

I affirm, under penalty of perjury, that the foregoing is true and correct

Rodolfo Herrera-Mena

Rodolfo Herrera-Mena
A# 92-878-235
El Centro Processing Center
El Centro, CA 92243
Pro Se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PETITION FOR WRIT OF HABEAS CORPUS AND MOTION TO PROCEED IN FORMA PAUPERIS AND MOTION TO APPOINTMENT OF COUNSEL.

CERTIFICATE OF SERVICE

I, Rodolfo Herrera-Mena , hereby declare under penalty of perjury that the foregoing is true and correct; I further certify that I am the above-entitled Petitioner to the above matter and that on, March 10, 2008, I served a true copy of the above mentioned motion upon the following person(s)[1]:

United States District Court
Southern District of California
880 Front Street Suite # 4290
San Diego, CA 92101-8900

Assistant U.S. Attorney
880 Front Street 6293
San Diego, CA 92101

Respectfully Submitted,

Rodolfo Herrera-Mena

[1] This Pro-Se filing is deemed filed upon delivery to prison authorities. See Fed. R. App. 25 (a)(c). Houston v. Lack, 487 U.S. 266, 101 L. Ed. 245, 108, S. Ct. 2379 at 274, 275 (1988). On San Diego Correctional Facility Form 602605-1781.

EXHIBIT (1)

MC-275

Name RUDY MENA

Address El Centro Service Processin Center

1115 North Imperial Avenue

El Centro, CA 92243

CDC or ID Number A# 92-878-235

SUPREME COURT OF CALIFORNIA

LOS ANGELES

(Court)

RUDY MENA Petitioner vs. EDMUND G. BROWN, Jr. et.,al Respondent	**PETITION FOR WRIT OF HABEAS CORPUS** No. ________ *(To be supplied by the Clerk of the Court)*

INSTRUCTIONS—READ CAREFULLY

- **If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.**
- **If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.**

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under rule 8.380 of the California Rules of Court [as amended effective January 1, 2007]. Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

Form Approved for Optional Use
Judicial Council of California
MC-275 [Rev. January 1, 2007]

PETITION FOR WRIT OF HABEAS CORPUS

Penal Code, § 1473 et seq.;
Cal. Rules of Court, rule 8.380
www.courtinfo.ca.gov

American LegalNet, Inc.
www.FormsWorkflow.com

MC-275

This petition concerns:

[X] A conviction
[ ] Parole
[ ] A sentence
[ ] Credits
[ ] Jail or prison conditions
[ ] Prison discipline
[ ] Other *(specify)*:

1. Your name: RUDY MENA
2. Where are you incarcerated? EL CENTRO PROCESSING CENTER/ EL CENTRO , CALIFORNIA
3. Why are you in custody? [X] Criminal Conviction [ ] Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

b. Penal or other code sections:

c. Name and location of sentencing or committing court: SUPERIOR COURT OF CLIFORNIA/ NEW PORT BEACH

d. Case number: 05 HF 1307

e. Date convicted or committed: JANUARY 20, 2006

f. Date sentenced: JANUARY 20, 2006

g. Length of sentence: THREE YEARS IN STATE PRISON

h. When do you expect to be released?

i. Were you represented by counsel in the trial court? [X] Yes. [ ] No. If yes, state the attorney's name and address:

GABRIEL SILVERS
8749 HOLLOWAY DR. WEST HOLLYWOOD 90069 PHONE(310) 652-0991 FAX (310) 652-1501

4. What was the LAST plea you entered? *(check one)*

[ ] Not guilty [ ] Guilty [ ] Nolo Contendere [ ] Other:

5. If you pleaded not guilty, what kind of trial did you have?

[X] Jury [ ] Judge without a jury [ ] Submitted on transcript [ ] Awaiting trial

MC-275

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." *(If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)*

Ineffective Assistance of counsel

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who* did exactly *what* to violate your rights at what time *(when)* or place *(where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

Petitioner's Previous Counsel(Gabriel Silvers) Failed to investigate the Probable Cause for the Search Warrant. Petitioner was prejudiced by the Ineffective Assistance of Counselsince, there is a reasonable probability that he could have uncovered a defense to the charges by unsealin parts of the search warrant. Petttioner's counsel failed to instruct the jury of less charges and the elements of Possession for sale of Controlled Substance. The Counsel failed to instruct the jury that this is Petitiuoner's first offense of drug related chares and that he was eligible for drugs proram. Petitioner's counsel failed to inform his client about his rights to appeal the conviction to higher court, and that he could face deportation and excluded from entering the United States, and that he will suffers the extremist hardship by seperated from his aging mother, and that he is the only one taking carr of his mother.

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

7. Ground 2 or Ground ______ *(if applicable)*: MC-275

The trial Court failed to instruct the jurt aboust less charges, and the elements of the possession for sale of controlled substance, and that because of Petitioner's first offense of drug related charges he could be convicted of less charges or could be sent to drug programs.

a. Supporting facts:

The Trial Court Prejudicially failed to sua sponte instructions to the jury trial about less charges and the elements of possession for sale of controlled substance, the trail Court prejudicially failed to instructs the jury of Petitioner first ofense ever of controlled substance and that he is eligible for drug treatements programs.

b. Supporting cases, rules, or other authority:

8. Did you appeal from the conviction, sentence, or commitment? ☐ Yes. ☒ No. If yes, give the following information:
   a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"): ____________
   b. Result ____________ c. Date of decision: ____________
   d. Case number or citation of opinion, if known: ____________
   e. Issues raised: (1) ____________
      (2) ____________
      (3) ____________
   f. Were you represented by counsel on appeal? ☐ Yes. ☐ No. If yes, state the attorney's name and address, if known:
   ____

9. Did you seek review in the California Supreme Court? ☐ Yes ☒ No. If yes, give the following information:
   a. Result ____________ b. Date of decision: ____________
   c. Case number or citation of opinion, if known: ____________
   d. Issues raised: (1) ____________
      (2) ____________
      (3) ____________

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

   Petitioner was not advised about an appeal by his previous counsel, he was efected by his counsel by not appealin his conviction, his counsel never raised an issues

11. Administrative Review:
   a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review:
   ____

   b. Did you seek the highest level of administrative review available? ☒ Yes. ☐ No.
   Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? [X] Yes. If yes, continue with number 13. [ ] No. If no, skip to number 15.

13. a. (1) Name of court: CALIFORNIA COURT OF APPEAL / FOURTH DISTRICT / DIVISION 3 case # (G 039663)

(2) Nature of proceeding (for example, "habeas corpus petition"): HABEAS CORPUS

(3) Issues raised: (a) INEFFICTIVE ASSISTANCE OF COUNSEL

(b) THE TRIAL COURT FAILED TO SUA SPONTE INSTRUCT THE JURY OF LESS CHARGES AND THE ELEMENTS OF POSSESSION FOR SALE

(4) Result *(Attach order or explain why unavailable)*: DENIED

(5) Date of decision: JANUARRY 13, 2008

b. (1) Name of court: ______

(2) Nature of proceeding: ______

(3) Issues raised: (a) ______

(b) ______

(4) Result *(Attach order or explain why unavailable)*: ______

(5) Date of decision: ______

c. *For additional prior petitions, applications, or motions, provide the same information on a separate page.*

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

______

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

______

16. Are you presently represented by counsel? [ ] Yes. [X] No. If yes, state the attorney's name and address, if known:

______

17. Do you have any petition, appeal, or other matter pending in any court? [ ] Yes. [X] No. If yes, explain:

______

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

______

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: ______ ▶ [signature]

(SIGNATURE OF PETITIONER)

Rudy Mena
A# 92-878-235
El Centro Processing Center
1115 North Imperial Avenue
El Centro, CA 92243
PRO-SE

CALIFORNIA SUPREME COURT

LOS ANGELES, CALIFORNIA

In re:	DOCKET NO.:
Rudy Mena	. **SUPERIOR COURT CASE NO.: 05 HF 1307** . **LOWER APPELLATE COURT CASE NO.: G039663**
On Habeas Corpus	**PETITION OF HABEAS CORPUS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF.**

I.

INTRUDUCTION

1. Rudy Mena, The Petitioner, was found guilty by a jury trial and was convicted of possession for sale of controlled substance in violation of Health & Safety Code in violation of Penal Code § 11351, Petitioner was represented by private counsel, Mr. Gabriel Silvers. Mr. Silvers failed to file a motion to challenge the search warrant, despite the fact that no probable cause appeared on the face of the warrant. Mr. Silver ever discuss with Petitioner his appeal rights to appeal after he was found guilty by the jury. Mr. Mena submitted a petition of writ of habeas corpus challenging his criminal conviction on ground ineffective assistance of counsel. His petition was denied by the Court of Appeal

for the state of California Fourth District, Division Three, case No.: (G039663). Due to the result of Petitioner's of his Due Process Clause, he is being facing deportation from the United States to Mexico, and facing extremist hardship by loosing his family and love ones.

II.

PARTIES

2. Petitioner, Rudy Mena, was convicted by a jury trial for the violation of Health & Safety Code § 11351. On January 20, 2006, he was sentenced to serve a three years sentence in state prison. On August 1, 2007, Petitioner was released from state prison and was picked and held by the Department of Homeland Security (DHS), and was placed on removal proceedings. Petitioner is currently incarcerated at El Centro Service Processing Center.

3. Edmond G. Brown, Jr, Attorney General of the State of California, Mr. Edmond G. Brown is the Attorney General of the State of California, he is responsible for the litigate Petitioner, and is responsible for convict Petitioner and sent him to prison.

4. Robert G. Rilliamas, the Officer in Charge in El Centro Processing Center part of the Department of Homeland Security, Mr. Rilliamas the legal custodian of Petitioner.

III.

STATEMENT OF THE FACTS

5. Petitioner, Rudy Mena, was arrested on July 29, 2005, when his house was searched by police pursuant to a search warrant. The search warrant was obtained following a telephone call between a confidential informant and a person whom the police officer believe was petitioner. The only information given about the timing between the call and execution of the search warrant. Based on this phone call, police acquired a search warrant and searched Petitioner's house.

6. Petitioner was charged in criminal complaint with one count of violation California Health & Safety Code § 11351, possession for sale of controlled substance. His preliminary hearing was held on August 15, 2005, after which he was bound held over for trial on the one charge on the complaint. Following the preliminary hearing, Petitioner was represented by

private counsel Gabriel Silvers, who never filed a motion to challenge the search warrant, despite the fact that no probable cause appeared on the face of the warrant.

7. Prior to the execution of the search warrant, police officers arrived at approximately nine in the morning. Detective Schoales watched the front of the house. Detective Schoales testified that at approximately 9:30 AM, a man he identified as Petitioner's co-defendant, Mr. Martinez Soto, parked in Petitioner's driveway in green colored Honda. Mr. Martinez Soto carried a small cardboard box with him. He went inside of the residence, then came out about five minutes later and moved his car to the street. About twenty minutes later, the police knocked on the front door of Petitioner's home, and entered when Petitioner opened the door.

8. When the police entered the house, they found the cardboard box that had been carried by Mr. Martinez Soto hidden in the couch near where Mr. Martinez Soto was found to be setting. Inside the box, the officers identified ten separate small plastic bags. Inside each bag was a white substance. Officer Topartzer recognized it as a substance consistent with cocaine.

9. Police also found what they claim to have been a "pay-owe" sheet. They did not find any fire arms or weapons, large amount of cash, or any paraphernalia consistent with selling drugs such as cussing substance or scales. Officer Topartzer also testified that Petitioner's fingerprints were not on the box, but Mr. Martinez Soto's fingerprints were on the box. However, Officer Topartzer put forth the theory of the prosecution that Mr. Martinez Soto brought the cocaine over to Petitioner's house to sell it to Petitioner, and that after Mr. Martinez Soto arrived, the negotiated regarding the price, which was reflected on the pay-owe sheet.

10. Following the testimony of Officers Toparatzer, Schoales and Reilly, the people and both defendants entered into a stipulation regarding the chemical test results of the substance inside of the confiscated box. The jury deliberated for about four hours, after which they returned with a guilty verdict on the one count on the information with regard to Petitioner.

11. Following the verdict, Petitioner spoke with his attorney, who apologized to Petitioner for losing the case. Petitioner did not see his attorney again until January 20, 2006, at his sentencing hearing. At the hearing, the Judge sentenced Petitioner to serve three years in state prison. She told Petitioner, " you have the absolute right to appeal me; and if you do, you have the right to appeal within 60 days." Petitioner's attorney again failed to explain to Petitioner his appeal rights.

IV.

ARGUMENT

1. PETITIONER SHOULD BE GRANTED RELIEF FRM DEFAULT UNDER THE DOCTRINE OF CONSTRUCTIVE FILING.

11. Rule4.305 of the California Rules of Court provides that Notice of appeal must be filed within (60) days of the rendition of judgment. Petitioner requests that he be granted relief from default arising from expiration of the (60) day limit.

12. California Courts have consistently liberally exercise their power to permit the late filing of notice to appeal. See In re Benoit (1973) 10 Cal.3d 72,81-84. Under Benoit, a defendant who has acted diligently to protect his appellate rights may be entitled to relief under "compelling circumstances." In Re Benoit, Supra, 10 Cal. 3d at 87.

13. Thus, where a defendant has demonstrated his intent to file an appeal in a timely fashion, the doctrine of constructive filling will relieve him of his failure to do so when he is thwarted by circumstances beyond his control. For example, a defendant who relies on his attorney's promise to file notice to appeal, or who depends on prison officials to mail the notice, may be held to have complied with the (60) day filing deadline. In Re Benoit, supra, 10 Cal. 3d at 86-87; People v. Slobodian (1947) 30 Cal. 2d 362; In Re fountain (1977) 74 Cal. App. 3d 715.

14. Relief has also been granted where a defendant could show where he or she was never advised of the right to appeal and was ignorant of appeal procedures. In Re Arthur N. (1974) 36 Ca. App. 3d 935; People v. Riley (1977) 73 Ca. App. 3d Supp. 1; Castro v. Superior Court (1974) 40 Cal. App. 3d 614, 621; see also In re Hernandez (1974) 40 Cal. App. 3d 893, 894; see also Cal. Penal Code § 1240.1.

15. The doctrine of constructive filing applies to Petitioner's case as well. Following Petitioner's conviction, his attorney, Gabriel Silvers, merely told that he was very sorry that petitioner had lost his case and did not discuss an appeal with Petitioner. Over a month later, at the sentencing hearing, the Judge provided the Petitioner with this advisal: "You have the absolute right to appeal me; and if you do, you have the right to appeal within (60) days."

California Rules of Court 4.305 states:

> After imposing a sentence or making an order deemed to be a final judgment in a criminal case upon conviction after trial, or after imposing sentence following a revocation of probation, except where the revocation is after the defendant's admission of violation of probation, the court shall advise the defendant of his or her right to appeal, of the necessary steps and time for taking an appeal, and of the right of an indigent to have counsel appointed by the reviewing court. A reporter's transcript of the proceedings required by this Rule shall be forthwith prepared and certified by the reporter and file with the clerk.

16. In the Instant case, the Judge's advisal can hardly be seen as having fulfilled her duty to apprise Petitioner of his appeal rights pursuant to this section. She did not advise Petitioner of his right to appeal the judgment, but said you can appeal "me.". To a criminal defendant, this does nothing to convey the substance of the right. Moreover, the Judge failed completely to describe the necessary steps for taking the appeal, and as for the time, she simply stated that he had the right to appeal within (60) days. There was nothing in her statement that conveyed that the time period for taking an appeal was mandatory and that his appeal rights would be lost if he did not so act within the (60) days following the rendition of judgment.

17. Moreover, throughout his criminal case, Petitioner was represented by private counsel, Mr. Gabriel Silvers. Mr. Silvers failed to ever discuss with Petitioner his appeal rights. As such, Petitioner's only advice regarding his appeal rights was utterly insufficient statement made by the trial judge at sentencing. The California Court of Appeals has recognized that courts must inform defendants of their rights because "[e]xperience has shown that persons who have just been convicted of a crime are among the most ignorant of litigants, less able than most to communicate with legal advisers who often failed to perform the most elementary duties one would expect of them." Castro, supra, 40 Cal. App. 3d at 619. Thus, the court has recognized the prevalence of Mr. Silvers' failure in this case. However, the courts have attempted to remedy this by *requiring* sentencing courts to advise defendants of their appeal rights. Nevertheless, in this case, the Judge offered Petitioner a completely inadequate advisal.

18. Indeed, it was not until Petitioner hired a new counsel following his release from prison that he discovered that he had a right to appeal his conviction in the first place. Petitioner's new counsel had to acquire and pay for transcripts in order to properly prepare his petition of writ of habeas corpus to the California Court of Appeal Fourth District Division Three, later the petition

was denied. As it is likewise a writ of habeas corpus, as such, Petitioner has exercise utmost diligence in protecting his appellate right.

2. DEFENSE COUNSEL'S FAILURE TO INVISTIGATE THE PROBABLE CAUSE FOR THE SEARCH WARRANT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

19. The judgment in this action is unlawful because Petitioner was denied the effective assistance of counsel in his trial in violation of his federal constitutional rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and his state constitutional rights as guaranteed by article I section 1, 7, 15 and 16 of the California constitution.

20. Criminal defendants have the right to be effectively represented by counsel, whether retained or appointed. People v. Frierson, 25 Cal. 3d 142, 162 (1979). Ineffective counsel is counsel who failed to act in a manner expected of a reasonably competent attorney acting as a diligent advocate. People v. Pope, 23 Cal. 3d 412, 425 (1979) [based on U.S. Const., Amend. VI; Ca. Const., Art. I, sec. 15].

21. The right of defendant in criminal proceedings to the effective assistance of counsel flows from the Sixth Amendment, made applicable to the states by the Fourteenth, as well as from the California Constitution. Id., Strickland v. Washington, 466 U.S. 668 (1984).

22. The Court must determine "whether the advice was within the range of competence demanded of attorneys in criminal cases" (McMann v. Richardson, 297 U.S. 759, 771 (1970); see also Scot v. Wainwright, 698 F.2d 427 (11th Cir. 1983)); and "whether the assistance rendered by the attorney demonstrates 'faithful representation' of the interest of the client," Tollet v. Henderson, 411 U.S. 258, 268 (1973). See also Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980) [Sixth Amendment requires defense counsel to "exercise the skill, judgment and diligence of a reasonably competent defense attorney"].

23. In Strickland v. Washington, supra, in response to the Petitioner's claim, the Supreme Court adopted the standard that defense attorney must provide reasonably effective assistance. The Court held that to prevail on claim of ineffective assistance of counsel, a defendant must prove that the representation provided by his or her counsel "fell below an objective standard of reasonableness." Id., at 687-689.

24. The California Supreme Court set forth the general standard of competency in People v. Pope, (1979) 23 Cal. 3d 412. In order to prove ineffective assistance of counsel under Art. I, section 16 of the California Constitution, Petitioner must:

> Prove the counsel failed to make particular investigation and that the omission resulted in the denial or inadequate representation of a potentially meritorious defense. People v. Williams (1988) 44. Cal. 3d. 883, 936, 245 Cal. Rptr. 336, 751, P. 2d 395. In particular, Petitioner must show that counsel knew or should have known that further investigation was necessary and must establish the nature and relevance of the evidence that counsel failed to present or discover. Finally, it must shown that the omission was not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make. People v. Frierson, (1979) 25 Cal. 3d 142, 158, Cal. Rptr. 281, 599 P.2d Cal. Rptr. 587. In re Sixto, (1989) 48 Cal. 3d 1247, 259 Cal. Rptr, 491, 496.

25. Here, defense Counsel's performance "fell below an objective standard of reasonableness," in that it was not "reasonable considering all the circumstances." Strickland v. Washington, supra, 466 U.S. at 687-689. Trial counsel, Mr. Silvers, was presented discovery, which included the search warrant that was obtained that led to Petitioner's arrest. The search warrant that was given to defense counsel, provides no indicia of probable cause. Rather, the issuing court in this case sealed the entire search warrant. In such a case, it is inconceivable that counsel would not even investigate further the basis for the search warrant.

26. One of the most fundamental components of the effective assistance is the obligation to conduct an adequate investigation of the facts of the case. As the Supreme Court held in Strickland v. Washington, 466 U.S. at 691, counsel must, at minimum, *conduct reasonable investigation* enabling him to make informed decisions about how best represent his client.[1] Counsel for an individual accused of a crime has a "duty to conduct careful and legal investigations and inquiries with a view to developing matters of defense in order that he may make informed decisions on his client's behalf..." In re Saunders (1970) 2 Cal. 3d 1033, 1041.

27. Here defense counsel's performance "fell below an objective standard of reasonableness," in that it was not "reasonable considering all the circumstances."

[1] See also Hendricks v. Vasquez, 074 F. 3d 1099, 1109 (9th Cir. 1992) (vacating conviction); United States v. Burrows, 872 F.2d 915, 918 (9th Cir. 1989) (reversing conviction for failure to investigate a mental defense); Evans v. Lewis, 855 F. 2d 631, 637 (9th Cir. 1988) (holding that a failure to investigate "cannot be construed as a trial tactic, where counsel did not even bother to view relevant documents that were available).

Strickland v. Washington, supra, 466 U.S. at 687-689. When a defendant is arrested based upon a search warrant, it is clearly within counsel's duty of competence to investigate the probable cause for the warrant. While, generally, a failure to investigate may be difficult to prove because investigation generally takes place outside of the courtroom and off the record, whether an investigation pursuant to a sealed warrant has been performed is quite transport in California. This is because that investigation would have begun with a proper motion to unseal the warrant pursuant to People v. Hobbs, (1994) 7 Cal. 4th 948. In general, this would have resulted in at least a partial unsealing of the warrant.

28. The California Supreme Court in the Hobbs decision noted that in many cases it is effective to redact the identity of the informant from the search warrant affidavit and then furnish the edited search warrant affidavit to the defendant. Id. at 962-63. The Court recognized in the Hobbs decision the difficulty a sealed affidavit presents for defense counsel, noting that, when most or all of the affidavit has been sealed, the defendant cannot be reasonably expected to make the preliminary showing under People v. Luttenberger (1950) 50 Cal. 3d 1 in order to obtain disclosure of a confidential informant in a search warrant affidavit. In Petitioner's case, the *entire* search warrant affidavit was sealed, with the exception of the name of the affiant. Therefore, Petitioner's counsel should have moved for unsealing of the affidavit to perform a proper investigation to determine whether to challenge the accuracy of the facts supporting probable cause for the warrant. The failure to do so constituted a complete failure to investigate what may have been a complete defense to the charges.

III. PETITIONER WAS PREJUDICED BY THE INEFFECTIVE ASSISTANCE OF COUNSEL SINCE HE THERE IS A REASONABLE PROBABILITY THAT HE COULD HAVE UNCOVERED A DEFENSE TO THE CHARGES BY UNSEALING PARTS OF THE SEARCH WARRANT.

29. In ineffective assistance of counsel, the prejudice test is whether it is reasonably probable that a determination more favorable to the defendant would have resulted in the absence of counsel's failure. *People v. Fosselman,* (1983) 33 Cal. 3d. 572, 584; People v. Pope, 23 Cal. 3d 412. The defense must show a reasonable probability of different outcome, i.e., a probability

sufficient to undermine confidence in the result. (Strickland v. Washington, (1984) 466 U.S. 668.) The standard of reversal is that the chances of a more favorable outcome must be significant, less than a preponderance (50%), but great enough to undermine in the existing outcome. People v. Howard, (1987) 190 cal. App. 3d 41, 45, 235 Cal. Rptr. 223.

30. In this case, because of counsel's complete failure a motion to unseal all or part of the search warrant, none of the facts supporting probable cause for the warrant are available to Petitioner for this petition, and he thus is at a loss to examine them to determine if he would have been able to mount a successful motion to suppress. However, it is probable, had at least a portion of the search warrant been unsealed, that a motion to quash could have been filed based on the veracity of the statements therein. There then exists a reasonable probability that the filing of a motion to quash would have resulted in determination more favorable to the defendant. The court can make this finding based upon its knowledge of the plea bargaining process alone.

31. In the alternative, as noted above, it is clear that counsel did not even take the first step in the investigation of the facts underlying probable cause for the warrant, because no motion was filed to unseal the warrant. The Supreme Court of the United States has noted that there are some instances where prejudice should be presumed. One example of the instance where prejudice should be presumed is in cases of an actual conflict of interest. See Cuyler v. Sullivan (1980) 446 U.S. 335, 345-350. The reasoning for this is that, in such an instance, counsel breaches the duty of loyalty, "perhaps the most basic of counsel's duties." Strickland, supra, 466 U.S. at 692. Another of counsel's most basic duties is the duty of competence, which includes, in the case of a criminal defense attorney, the duty to investigate. Therefore, counsel clearly and completely failed to perform competently in this case.

32. While counsel's complete failure to investigate may very well have been harmless, it certainly is not within Petitioner's powers to adduce facts that lead will help this court determine whether he was prejudiced by that failure because he cannot now make a motion to unseal the search warrant. Only his former attorney had that power, and he did not exercise it. Because, in this case, it is so clear that counsel did not even begin to investigate the facts supporting the issuance of the search warrant, such a limited presumption should be applied in this case under these facts, as Petitioner has shown that his attorney completely failed to perform his duties competently.

33. The proper result here is to grant the Petition for habeas corpus on the grounds of ineffective assistance during the trial, so that Petitioner can have his defense handled competently with the proper evidence presented to the jury.

PETITIONER CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

34. Criminal defendants have the right to be effectively represented, whether retained or appointed. *People v. Frierson* (1979) 25 Cal. 3d 142, 162, 158 Cal. Rptr. 281, 291.) Ineffective counsel is counsel who failed to act in manner to be expected of a reasonably competent attorney acting diligent advocate, and that counsel's representation result in the withdraw of potentially meritorious defense. *People v. Pope* (1979) 23 Cal. 3d 412, 425, 152 Cal. Rptr. 732, 739 [based on U.S. Constitution, Amend. VI; Cal. Const., Art. I, sec. 15]).

35. The right of defendant in criminal proceedings to the effective assistance of counsel flows from Six Amendment, made applicable to the states by the Fourteenth, as well as the California Constitution. *Strickland v. Washington* (1984) 466 U.S. 668.)

36. California Supreme Court set forth the general standard of competency in *People v. Pope* (1979) 23 Cal. 3d 412, 152 Cal. Rptr. 732. In order to prove ineffective assistance of counsel under Article I, section 16 of the California Constitution, petitioner must prove that counsel failed to make particular investigations and that the omissions resulted in the denial or inadequate representation resulted in the denial or inadequate on a potentially meritorious defense. *People v. Williams* (1988) 44 Cal. 3d 883, 936, 245 Cal. Rptr. 336, 751 P. 2d 395). In particular, petitioner must show that the counsel knew or should have known that further investigation was necessary and must establish the nature and relevance of the evidence that counsel failed to present or discover. Finally, it must also be shown that the omission was not attributed to tactical decision which a reasonably competent, experienced criminal defense attorney would make. *People v. Frierson* (1979) 25 Cal, 3d 142, 158 Cal, Rptr. 281, 599 P. . 2d Cal. 587.) (In re sexto (1989) 48 Cal, 3d 1247, 259 Cal. Rptr. 491, 496.)

37. Here. Defense counsel's Mr. Gabriel Silver performance 'fell bellow an objective standard of reasonableness', in that it was not "reasonable considering all the circumstances". *Strickland v. Washington,* supra, 466 U.S. 668, 687-689). Mr. Silver failed to file motion to challenge search warrant, and failed to advise Petitioner about his right to appeal the conviction

and seek to review it in higher Court, also Silver failed to discuss the conviction with petitioner and that the conviction could result in being deported and excluded from entering to the United States, Petitioner is now faced with disastrous Immigration consequences and will suffer the extremist hardship if deported to Mexico, if Petitioner knows about the Immigration consequences, he will ask his counsel to appeal the conviction or ask the sentencing Judge to lower the sentence for less than one year so he could avoid the deportation. Defense counsel was aware that the petitioner was not a U.S. citizen, in spite of awareness, defense counsel failed to investigate the Immigration consequences and failed to advised his client of the adverse Immigration consequences he would be subjected to, petitioner has severely prejudiced.

38. To prevail on his claim of ineffective assistance of counsel, Mr.Rudy Mena must prove (1) that his counsel's performance fell below an objective standard of reasonableness, and (2) that the deficiency in his counsel's performance prejudice him. *Strickland v. Washington,* 466 U.S. 668 692, 80 L. Ed. 2d.647, 104 S. Ct. 2052 (1984).

39. While the Ninth Circuit determined what "more" would cause a defense counsel's advice, or lack thereof, regarding the immigration consequences of a conviction to fall below an objective standard of reasonableness, the 9th Circuit noted that the Second Circuit has held that an affirmative misrepresentation regarding immigration consequences is deficient under Strickland. *United States v. Couto,* 311 F.3d 179, 178-88 (2d Cir. 2002). In Couto, the Second Circuit noted that it had previously held "that an attorney's failure to inform a client of deportation consequences of his conviction, without more, does not fall below an objective standard of reasonableness," id. At 187 (*citing United States v. Santelises,* 509 F.2d 703, 704 (2d Cir. 1975)), but recognized that the circumstances of Couto's case were more egregious. In Couto, as here, counsel had not merely failed to advise his client regarding deportation consequences: in response to his client's inquiry, counsel assured Couto that while deportation was possibility, "there were many things that could be done to prevent here from being deported." Couto, 311 F.3d at 183. Couto's counsel's advice was, however, incorrect. "Because the 1996 amendments to the immigration and Nationality Act eliminated all direction as to deportation of non-citizens convicted of aggravated felonies, her plea of guilty meant virtually automatic, unavoidable deportation. Id. At 183-84. As a result, the Second Circuit found that Couto's counsel had affirmatively misrepresented the deportation consequences of Couto's

guilty plea and held that such an affirmative misrepresentation is objectively unreasonable, particularly in light of contemporary standards of attorney competence.

40. The Second Circuit also discussed evidence that "standards of attorney competence [may] have evolved to the point that a failure to inform a defendant of deportation consequences of his conviction would by itself now be objectively unreasonable" but did not reach the issue. Couto, 311 F.3d at 188. See also *Downs-Morgan v. United States,* 765 F.2d 1534, 1540-41 (11th Cir. 1985) (finding affirmative misrepresentation regarding immigration consequences, coupled with likelihood that petitioner would be imprisoned and executed after deportation, and could be ineffective assistance).

41. The circumstances of the instant case are analogous to those in Couto. The 9th Circuit agreed that where, as her, counsel has not merely failed to inform, but has effectively misled, his client about the immigration consequences of a conviction, counsel's performance is objectively unreasonable under contemporary standards for attorney competence.

42. Counsel's performance also fell below the American Bar Association's ethical standard for criminal defense attorneys with respect to immigration consequences. The Supreme Court noted this standard in *INS v. St. Cyr,* 533 U.S.. 289, 150 L. E.d. 2d 347, 121 S. Ct. 2271 (2001): The American Bar Association's Standards of Criminal Justice provide that, if a defendant will face deportation as result of conviction, defense counsel 'should fully advise the defendant of these consequences.'" Id. At 323 (queting 3 ABA Standards for Criminal Justice 14-3.2 Comment, 75 (2d ed. 1982)). Although "breach of an ethical standard does not necessarily make out a denial of the Six Amendment guarantee of assistance of counsel," *Nix v. Whiteside,* 475 U.S. 157, 165, 89 L. Ed. 2d 123, 106 S. Ct. 988 (1986), "prevailing norms of practice as reflected in American Bar Association Standards and the like... are guides to determining what is reasonable..." Strickland, 466 U.S. at 688.

43. In the Strickland prejudice analysis, the determinative question is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Glover v. United States,* 531 U.S. 198, 202-03, 148 L. Ed. 2d 604, 121 S. Ct. 696 (2002). To demonstrate this, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693.

44. Mr.Rudy Mena alleges that, but for counsel's deficient performance, the outcome of his proceedings would have differed in one of two ways. Specifically, Mr.Rudy Mena alleges that

"had he knows that constituted an aggravated felony,' he would have discussed with his lawyer the possibility of amending appeal or asking the [sentencing] court for downward departure." Although the sentencing judge would not have had the discretion to grant a downward departure solely on the basic of immigration consequences. *United Sates v. Alvarez-Cardenas,* 902 F.2d 734, 736-37 (9th Cir. 1990), Mr.Rudy Mena was potentially eligible for downward departures on other grounds. Had counsel and the court been aware that a nominally shorter sentence would avoid deportation; there is reasonable probability that the court would have imposed a sentence of less than one year or appeals the conviction to higher Court.

45. In addition, Mr.Rudy Mena explains that, had he been made aware of deportation consequences of his conviction, he would have explored the option of appeal the conviction and to negotiate to lower his sentence. Mr.Rudy Mena will suffer great lengths hardship by deportation and separation from his wife and children, who are all United States citizen. Taken together, these facts establish that but for counsel's deficient performance, there is reasonable probability that Mr.Rudy Mena would have moved to appeal his conviction. After appealing the conviction to higher court. Mr.Rudy Mena could have renegotiated his sentence with the Sentencing Judge to avoid deportation; or the parties could have stipulated that Mr.Rudy Mena would be sentenced to less than one year in county jail.

46. As noted above, a sentencing court may exercise its discretion to sentence Petitioner to less than one year in county jail to avoid deportation, ***United States v. Leonti,*** 326 F.3d 1111, 1122 (9th Cir. 2003) (holding that petitioner could establish prejudice by shown that counsel's deficient performance reduced likelihood that prosecution would make a substantial assistance motion, even though "the government has wide discretion in filing a substantial assistance motion, and the court has discretion in choosing to depart downward"). "A deprivation of an opportunity to have a sentencing court exercise its discretion in a defendant's favor can constitute ineffective assistance of counsel." Castro, 26 F.3d at 560 (holding that counsel's failure to request that sentencing judge exercise its discretion to make judicial recommendation against deportation was prejudicial under Strickland) (*citing United States v. Gorden,* 854 F.2d 31, 32 (3dCir. 1988)). For the foregoing reasons, this court should conclude that Mr.Rudy Mena has established his claim of ineffective assistance of counsel under Strickland, which is fundamental error.

Analysis On Claims Of In Effective Assistance Of Counsel.

47. A defendant claiming ineffective assistance of counsel has the burden to show (1) counsels performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance resulted in prejudice. *(Strickland v Washington,* 466 U.S. 668, 688*; People v. Ledsma* (1987) 43 Cal.3d 171, 216, 218. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra 466 U.S. at 694. The defendant must affirmatively show counsel's deficiency involved a crucial issue and cannot be explained on the basis of any knowledgeable choice of tactics. *People v. Jackson* (1980) 28 Cal. 3d 264, 289. *See Soriano Supra*, 194 F.3d 1497.

Duty Of Counsel To Prevent Or Reduce The Immigration Consequences And To Insulate The Defendant From Subtle Of Egregious Constitutional Violations

48. *In Re Vargas* 83 Cal. App. 4th 1134 ([100 Cal Rptr 2d 265(Cal. App. 2 Dist 2000) the reviewing court stated that to "establish prejudice he must show [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different a reasonable probability is a probability sufficient to undermine the confidence in the outcome.[Citation.] *William v. Taylor* (2000) 529 U.S. 362, 390-391, 120 S.Ct. 1495, 1511-12, 146 l. Ed. 2d 389, citing *(Strickland v Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 80 l. Ed. 2d 1175 674; In re Jones (1996) 13 Cal. 4th 552, 561, 54 Cal. Rptr. 2d 52, 917 P.2d 1175,) The effectiveness must deprive the defendant of a substantive or procedural right to which the law entitles him " *William v. Taylor Supra,* 529 U.S. at 393, 120 S.Ct at 1453....[T]here are situations in which the overriding focus on fundamental fairness may affect the analysis." *Id* at 393, 120 S.Ct. at p.1512. "The "strategic choices made after through investigation of law and facts relevant to plausible options are virtually unchallengeable..." [Citation.}" *In re Cujio* (1999) 20 Cal 4th 673, 692, 85 Cal Rptr. 2d 436, 977 P. 2d 66.) However such deference cannot be abdication. Deference "must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or

omissions." [Citation.] Otherwise, the constitutional right to the effective assistance of counsel would be reduced to form without substance

THE CRIMINAL COURT ERRED PREJUDICIALLY BY FAILING TO GIVE SUA SPOTNTE AN INSTRUCTION ON POSSESION OF CONTROLLED SUBSTANCE AS A LESSER INCLUDED OFFENSE OR POSSESSION FOR SALE

A. Introduction

49. The information charged that the possession for sale was committed by means to attempted to sale. Under the accusatory pleading test, simple possession is a lesser included offense of the possession for sale, i.e, the possession for sale had to involve the element of attempted to sale. In this case there was evidence upon which the court could have absolved Respondent of the possession for sale, but not the simple possession. As well be appointed out below, there were a significant number of inconsistencies between the statement Mr. Martinez Soto gave to the officer Schoales and his trial testimony, as well as other weaknesses in the prosecution's case, so that the jury could absolved Petitioner of culpability for possession for sale, but not the lesser offense of simple possession. Therefore, the trial court should have instructed the jury that simple possession was lesser included offense of the possession for sale. Failure to do so was prejudicial error

B. Waiver of *Sua Sponte* Instructions.

50. Petitioner did not request an instruction on simple possession. However, the failure to give *Sua Sponte* instruction may be considered on appeal without objection; it is the duty of the court to ensure that the jury is properly instructed. (*People v. Wickersham* (1982) 32 Cal. 3d 307, 324-326 [overruled on other grounds in *People v. Barton* (1995) 12 Cal. 4th 186, 201].) The appeal reemphasized this principle in *People v. Smith* (1992) 9 Cal. App. 4th 196, 207, when it rejected the Attorney General's claim that the defendant had waived his claim that the trial court failed to properly instruct n the weapons enhancements. "[w]here ...the error consists of breach

of the trial court's fundamental instructional duty...", no objection is required. In that citation, the defendant need not object, and he need not "request amplification or modification."

As the Supreme Court noted in *People v. Breverman* (1998) 19 Ca. 4th 142, 154, " The obligation to instruct on lesser included offences exists even when as a matter of trial tactics, a defendant not only fails to request the instruction but expressly objects to its being given.[Citation.]"

In Breverman, the Supreme Court explained the broader interests served by the *Sua Ponte* instructional rule.

> Just as the People have no legitimate interest in obtaining a conviction of a great offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citation.] On the contrary as we have expressly, the rule seeks the most accurate possible judgment by " ensur[ing] that the jury will consider the *full range of possible verdict"* included in the charge, regardless of the parties wishes or tactics. [Citation.] (Breverman, *supra*, 19 Cal. 4th at P. 155.) [Emphasis added.]
>
> Accordingly, even though Respondent did not request a lesser included instruction on battery, the trial court was not absolved of its duty to issue one.

C. *Sua sponte* Instructions.

51. A court must instruct *Sua Sponte* on general principles of law that are closely and openly connected with the facts presented at trial. *(People v. Wickersham, supra,* 32 Cal. 3d at P. 323, disapproved on other grounds in *People v. Barton, supra,* 12 Cal. 4th at p 200-201.) This *sua sponte* obligation extends to lesser included offenses if the evidence "raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense. (*People v. Ramkeesoon (*1985) 39 Cal. 3d 346, 351; accord, Barton, *supra,* 12 Cal. 4th at p 194-195.)

This instructional rule benefits both the prosecution and the defense (*People v. Barton,* (*supra,* 12 Cal. 4th at p. 194-195.) It:

> [E]nsures that the jury be exposed to the full range of verdict option which, by operation of law and with full notice to both parties, are presented *in the accusatory pleading itself* and are thus closely and openly connected to the case. In this context, the rule prevents either party … from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Here, the rule encourages a verdict, within the charge chosen by the prosecution, that is neither "harsher [n]or more lenient than the evidence merits." (People v. Briks (1998) 19 Cal. 4th 108, 119.) [original italics.]

52. The California Supreme Court has stated, "A criminal defendant is entitled to an instruction on a lesser included offense only if [citation] there is evidence which, if accepted by the trier of fact, would absolve [the] defendant from guilt of the greater offense [citation] *but not the lesser.* [Citation]." (*People v. Memro* (1995) 11 Cal. 4th 786, 871.) [Original italics.] The *sua sponte* duty to instruct on lesser-included offenses, unlike the duty to instruct on mere defenses, arises even against the defendant's wishes, and regardless of the trial theories or tactics the defendant has actually pursued. (*People v. Breverman, supra,* 19 Cal. 4th 142, 154-155.) Doubts as to the sufficiency of the evidence should be resolved in favor of the accused. (*People v. Flannel* (1979) 25 Cal. 3d 668, 674-675.)

V.

CONCLUSION

Having exercised diligence in pursuing his appellate rights, Petitioner respectfully requests that this court grant him relief from default by issuing its writ of habeas corpus, or, in the alternative, an order directing the constructive filing of the notice of appeal in Loss Angeles County Superior Court case No. 05HF1307.

VI

PRAYER FOR RELIEF

Petitioner, Rudy Mena is without remedy save by writ of habeas corpus. WHEREFORE, Petitioner prays the Court :

1. Issue a writ of habeas corpus;
2. Declare the rights of parties;
3. Reverse the guilty finding by the jury trial convicting Petitioner of violation of Health & Safety Code § 11351 possession for sale of controlled substance.
4. Declare that Petitioner case was prejudiced by, and he was denied the right to fair trial by ineffective assistance of counsel.
5. Grant any other and further relief the Court deems proper.

Respectfully Submitted,

Dated: February 5, 2008

RUDY MENA

Rudy Mena
A# 92-878-235
El Centro Processing Center
1115 North Imperial Avenue
El Centro, CA 92243
PRO-SE

VEREFICATION

I, Rudy Mena, hereby declare as following:

All of the facts alleged in the instant Petition that are not otherwise supported by the record in *People v. Rudy Mena,* Superior Court of California, County of Loss Angeles, case No. 05HF1307 or by the declarations, are true of my own personal knowledge.

I declare under the penalty of perjury under the laws of the United States, and the State of California that the foregoing is true and correct.

Executed this 5th day of February, 2008, in El Centro, California.

Rudy Mena

Rudy Mena
A# 92-878-235
El Centro Processing Center
1115 North Imperial Avenue
El Centro, CA 92243
PRO-SE

DECLARATION OF RUDY MENA

I, Rudy Mena, hereby declare and say the following:

1. I am the Defendant and the Petitioner in this action. I execute this declaration in support of the court allowing me to file a late appeal in my case.
2. I was convicted pursuant to jury trial in case No. 05HF 1307. The verdict on my case was rendered on December 8, 2005. Following the verdict, I was sentenced on January 20, 2006.
3. On the day that the verdict was rendered, my attorney, Gabriel Silvers, simply told me that he was very sorry that he had lost my case. He did not, however, explaine to me what the jury's findings were. He simply said that he would see me again on January 20, 2006. He never explained to me that I could appeal that verdict.
4. On January 20, 2006, Mr. Silvers appeared with me in court. He did not argue for a low sentence or anything. The Judge sentenced me to 3 years in state prison. I have since reviewed the transcripts, and it appears that the judge informed me that I had a right to appeal here, but I did not understand that I ever had the right to appeal the Judg's decision.
5. Moreover, Mr. Silvers never explained to me that I had a right to appeal the jury's verdict in my case. As a result, I did not ever understand that I could further challenge the jury verdict in my case. I had no idea when I had to file an appeal or how I could submit an appeal.
6. I ask this Court to allow me to appeal my conviction now, because I believe there were many errors in my case.

I declare under penalty of perjury that the following is true and correct and that if called to testify with respect thereto, I could do so completely.

Executed this 5th day of February, 2008 in El Centro, California.

Rudy Mena

Rudy Mena
A# 92-878-235
El Centro Processing Center
1115 North Imperial Avenue
El Centro, CA 92243
PRO-SE

CALIFORNIA SUPREME COURT
LOS ANGELES, CALIFORNIA

In re: **Rudy Mena** **On Habeas Corpus**	**DOCKET NO.:** **. SUPERIOR COURT** **CASE NO.: 05 HF 1307** **. LOWER APPELLATE COURT** **CASE NO.: G039663** **PROOF OF SERVICE**

1) That I am over eighteen of age, detained at DHS / ICE at El Centro Processing Center at 1115 North Imperial Avenue, El Centro, California 92243.

2) That I mailed an (PETITION OF HABEAS CORPUS) to the California Supreme Court.

3) I served the within petition of habeas corpus by mailing a copy to:

Edmund G. Brown, Jr
California Attorney General
1300 "I" Street
P.O. Box. 944255
Sacramento, California, 92660

____

District Attorney of Orange County
Harber Justice Center
4601 Jamboree Road
Newport Beach, California 92660

Superior Court of The State of California
Harber Justice Center
4601 Jamboree Road
Newport Beach, California 92660

4) That the same were delivered and deposited in the United States mail, first class postage prepaid, at El Centro, California on February 5, 2008.

I certify that the forgoing is true and correct. Executed on February 5, 2008, at El Centro, California.

Rudy Mena

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE

DOCKET REPORT

Case : 05HF1307 F A

Name : Mena, Rudy

Date of Action	Seq Nbr	Code	Text
08/02/05	1	FLDOC	**Original Complaint filed on 08/02/2005 by Orange County District Attorney.**
	2	FLNAM	Name filed: Mena, Rudy
	3	FLCNT	FELONY charge of 11351 HS filed as count 1. Date of violation: 07/29/2005.
	4	FLALG	1203.073(b)(1) PC added as other allegation as to count 1.
	5	CLADD	Case calendared on 08/02/05 at 1:30 PM in H2 for ARGN.
	6	HHELD	**Hearing held on 08/02/2005 at 01:30:00 PM in Department H2 for Arraignment.**
	7	OFJUD	Officiating Judge: Craig E. Robison, Judge
	8	OFJA	Clerk: J. Barrera
	9	OFBAL	Bailiff: D. Cheli
	10	OFREP	Court Reporter: Karen Lee
	11	APDDA	People represented by Joe Williams, Deputy District Attorney, present.
	12	APDPP	Defendant present in Court in propria persona.
	13	DFTNC	Defendant states true name and date of birth are correct as shown on the complaint.
	14	ADLCR	Defendant advised of legal and constitutional rights.
	15	APDPD	Court appoints Public Defender to represent Defendant.
	16	APDWPD	Defendant present in Court with counsel Holly Galloway, Public Defender.
	17	APCON	Public Defender declares a conflict.
	18	APDAL	Court appoints Alternate Defender to represent Defendant.
	19	APATR	Holly Galloway relieved as Counsel of Record.
	20	APSPC	Holly Galloway makes a special appearance for Stephen T Crandall, Alternate Defender. Defendant present.
	21	CPACK	Counsel acknowledges receipt of the complaint.
	22	WVRAA	Defendant waives reading and advisement of the Original Complaint.
	23	PLNGA	**To the Original Complaint defendant pleads NOT GUILTY to all counts.**
	24	DFDAG	Defendant denies allegations.
	25	CLSET	Pre Trial set on 08/08/2005 at 08:30 AM in Department H2.
	26	CLSET	Preliminary Hearing set on 08/15/2005 at 08:30 AM in Department H2.
	27	DFOTR	Defendant ordered to appear.
	28	BLSET	Court orders bail set in the amount of $100, 000.00.
	29	BLHBP	Court orders hearing pursuant to Penal Code 1275.1 before bail or bond is accepted.
	30	DFREM	Defendant remanded to the custody of the Sheriff.
	31	NTJAL	Notice to Sheriff issued.
	32	FIFPC	Fingerprint card is received and filed.
08/08/05	1	HHELD	**Hearing held on 08/08/2005 at 08:30:00 AM in Department H2 for Pre Trial.**
	2	OFJUD	Officiating Judge: Craig E. Robison, Judge

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE

DOCKET REPORT

Case : 05HF1307 F A

Name : Mena, Rudy

Date of Action	Seq Nbr	Code	Text
08/08/05	3	OFJA	Clerk: L. K. Mc Donald
	4	OFBAL	Bailiff: C. S. Rozean
	5	OFREP	Court Reporter: Karen Lee
	6	APDDA	People represented by Joe Nedza, Deputy District Attorney, present.
	7	APNDC	Defendant not present in Court represented by Stephen T Crandall, Alternate Defender.
	8	APDHC	Defendant remains in holding cell, not brought into courtroom.
	9	CLPTP	Pretrial off calendar, Preliminary Hearing set on 08/15/2005 at 08:30 AM in H2 to remain.
	10	BLSTR	Current bail set for defendant to remain.
	11	BLHTR	Court orders hold pursuant to Penal Code 1275.1 to remain.
	12	DFREM	Defendant remanded to the custody of the Sheriff.
	13	NTJAL	Notice to Sheriff issued.
08/15/05	1	HHELD	**Hearing held on 08/15/2005 at 08:30:00 AM in Department H2 for Preliminary Hearing.**
	2	OFJUD	Officiating Judge: Craig E. Robison, Judge
	3	OFJA	Clerk: L. K. Mc Donald
	4	OFBAL	Bailiff: A. E. Orr
	5	OFREP	Court Reporter: Karen Lee
	6	APDDA	People represented by Michael Fell, Deputy District Attorney, present.
	7	APNDC	Defendant not present in Court represented by Stephen T Crandall, Alternate Defender.
	8	APDHC	Defendant remains in holding cell, not brought into courtroom.
	9	CLSET	Preliminary Hearing transferred to 08/15/2005 at 01:50 PM in Department H11.
	10	HHELD	**Hearing held on 08/15/2005 at 01:50:00 PM in Department H11 for Preliminary Hearing.**
	11	OFJUD	Officiating Judge: H. Warren Siegel, Judge
	12	OFJA	Clerk: D. Lamm
	13	OFBAL	Bailiff: J. F. Limone
	14	OFREP	Court Reporter: Kristy Damron
	15	APDDA	People represented by Michael Fell, Deputy District Attorney, present.
	16	APDWAL	Defendant present in Court with counsel Crandall, Stephen T, Alternate Defender.
	17	WVRAA	Defendant waives reading and advisement of the Original Complaint.
	18	TRWST	**Witness, Officer John Topartzer, sworn and testified.**
	19	TRWID	Witness identified the defendant.
	20	TRWEX	Witness excused.
	21	TRPRS	People rest.
	22	TRNAD	No affirmative defense.
	23	TRDRS	Defense rests.
	24	MOHTA	Motion by People that defendant be Held To Answer as charged in the complaint as to count(s) 1.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF ORANGE

DOCKET REPORT

Case : 05HF1307 F A

Name : Mena, Rudy

Date of Action	Seq Nbr	Code	Text
08/15/05	25	MOTION	Motion argued.
	26	TRPRS	People submit.
	27	TRDRS	Defense submits.
	28	FDHTA	It appearing to the Court that a felony has been committed and there being sufficient and probable cause to believe that the Defendant committed said felony, Defendant is hereby ordered HELD TO ANSWER on 08/30/2005 at 08:00 AM in Department C5 as to count(s) 1. Defendant ordered to appear.
	29	BLSTR	Current bail set for defendant to remain.
	30	DFREM	Defendant remanded to the custody of the Sheriff.
	31	NTJAL	Notice to Sheriff issued.
08/23/05	1	FIRTF	Reporter's transcripts dated August 15, 2005 received and filed.
	2	FITXT	Receipt for Court Reporter's transcript received and filed.
08/24/05	1	CPGTO	Copy of transcript given to Phuong Nguyen-Alternate Defender.
08/26/05	1	FLDOC	**Original Information filed on 08/26/2005 by Orange County District Attorney.**
	2	FLCNT	FELONY charge of 11351 HS filed as count 1. Date of violation: 07/29/2005.
	3	FLALG	1203.073(b)(1) PC added as other allegation as to count 1.
08/29/05	1	CPGTO	Copy of transcript given to District Attorney Office.
08/30/05	1	HHELD	**Hearing held on 08/30/2005 at 08:00:00 AM in Department C5 for Arraignment.**
	2	OFNOC	# 60 on calendar.
	3	OFJUD	Officiating Judge: Daniel J. Didier, Judge
	4	OFJA	Clerk: C. Neuenschwander
	5	OFBAL	Bailiff: C. J. Thurber
	6	OFREP	Court Reporter: Marlene Iannello
	7	APATR	Stephen T Crandall relieved as Counsel of Record.
	8	APSUB	Gabriel Silvers, Retained Attorney, substituting in as Attorney of Record.
	9	APDWRA	Defendant present in Court with counsel Silvers, Gabriel, Retained Attorney.
	10	APDDA	People represented by Steven Baric, Deputy District Attorney, present.
	11	CPCDD	Copy of Original Information given to defendant.
	12	WVRAA	Defendant waives reading and advisement of the Original Information.
	13	PLNGA	**To the Original Information defendant pleads NOT GUILTY to all counts.**
	14	PLCJN	Counsel joins in waivers and plea.
	15	CLASN2	Case assigned for all purposes to Department H12, Judge Susanne S. Shaw. Time estimate 4 days. Pre Trial re: Trial Setting Conference set on 09/09/2005 at 08:00 AM.
	16	DFOTR	Defendant ordered to appear.
	17	DFREM	Defendant remanded to the custody of the Sheriff.
	18	BLSTR	Current bail set for defendant to remain.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF ORANGE

DOCKET REPORT

Case : 05HF1307 F A

Name : Mena, Rudy

Date of Action	Seq Nbr	Code	Text
08/30/05	19	NTJAL	Notice to Sheriff issued.
	20	OFMEC	Minutes entered by T. Ebbert.
09/09/05	1	HHELD	**Hearing held on 09/09/2005 at 08:00:00 AM in Department H12 for Pre Trial Trial Setting Conference.**
	2	OFJUD	Officiating Judge: Susanne S. Shaw, Judge
	3	OFJA	Clerk: T. Lewis
	4	OFBAL	Bailiff: B. Parenteau
	5	OFREP	Court Reporter: Shelley Hill
	6	APDDA	People represented by Andre Manssourian, Deputy District Attorney, present.
	7	APNDC	Defendant not present in Court represented by Gabriel Silvers, Retained Attorney.
	8	APDHC	Defendant remains in holding cell, not brought into courtroom.
	9	CLSET	Pre Trial set on 10/07/2005 at 08:30 AM in Department H12.
	10	CLSET	Jury Trial set on 10/17/2005 at 08:30 AM in Department H12.
	11	WVNWT	Defendant does not waive statutory time for trial.
	12	BLSTR	Current bail set for defendant to remain.
	13	DFREM	Defendant remanded to the custody of the Sheriff.
	14	NTJAL	Notice to Sheriff issued.
10/07/05	1	HHELD	**Hearing held on 10/07/2005 at 08:30:00 AM in Department H12 for Pre Trial.**
	2	OFJUD	Officiating Judge: Susanne S. Shaw, Judge
	3	OFJA	Clerk: J. F. Siebert
	4	OFBAL	Bailiff: B. Parenteau
	5	OFREP	Court Reporter: Karen Puckett
	6	OFMEC	Minutes entered by S. Bartush.
	7	APDDA	People represented by Jennifer Walker, Deputy District Attorney, present.
	8	APDWC	Defendant present in Court with counsel Gabriel Silvers, Retained Attorney.
	9	CLVAC	Jury Trial vacated for 10/17/2005 at 08:30 AM in H12.
	10	CLSET	Pre Trial set on 11/18/2005 at 08:30 AM in Department H12.
	11	CLSET	Jury Trial set on 12/05/2005 at 08:30 AM in Department H12.
	12	WVTIM	Defendant waives statutory time for Jury Trial.
	13	BLSTR	Current bail set for defendant to remain.
	14	DFREM	Defendant remanded to the custody of the Sheriff.
	15	NTJAL	Notice to Sheriff issued.
	16	BLHBP	Court orders hearing pursuant to Penal Code 1275.1 before bail or bond is accepted.
11/07/05	1	FIMTN	Defense motion re: motion to dismiss pursuant to penal code section 995 filed.
	2	CLCST2	Motion re: Penal Code 995 set on 11/18/2005 at 09:00 AM in Department H12.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE

DOCKET REPORT

Case : 05HF1307 F A

Name : Mena, Rudy

Date of Action	Seq Nbr	Code	Text
11/14/05	1	TXREC	Notice and motion to continue defendant's motion to dismiss pursuant to penal code 995(penal code 1050; Rule 800 OC Coordinated Trail Court Rules); Declaration in support received at counter and forwarded to Harbor Justice Center.
11/15/05	1	FIMTN	People's motion re: motion to continue defendants motion to dismiss filed.
	2	CLCST2	Motion re: Continuance set on 11/18/2005 at 09:00 AM in Department H12.
11/18/05	1	HHELD	**Hearing held on 11/18/2005 at 09:00:00 AM in Department H12 for Motion Continuance.**
	2	HHELD	**Hearing held on 11/18/2005 at 08:30:00 AM in Department H12 for Pre Trial.**
	3	HHELD	**Hearing held on 11/18/2005 at 09:00:00 AM in Department H12 for Motion Penal Code 995.**
	4	OFJUD	Officiating Judge: Susanne S. Shaw, Judge
	5	OFJA	Clerk: F. Bicknell
	6	OFBAL	Bailiff: B. Parenteau
	7	OFREP	Court Reporter: Karen Puckett
	8	APDDA	People represented by Jennifer Walker, Deputy District Attorney, present.
	9	APNDC	Defendant not present in Court represented by Gabriel Silvers, Retained Attorney.
	10	APDHC	Defendant remains in holding cell, not brought into courtroom.
	11	TEXT	Motion to continue granted
	12	CLCON2	Motion re: Penal Code 995 continued to 12/02/2005 at 08:30 AM in Department H12 at request of People.
	13	CLCON	Pre Trial continued to 12/02/2005 at 08:30 AM in Department H12 at request of People.
	14	CLTRM	Jury Trial for 12/05/2005 08:30 AM in H12 to remain.
	15	DFOTR	Defendant ordered to appear.
	16	BLSTR	Current bail set for defendant to remain.
	17	DFREM	Defendant remanded to the custody of the Sheriff.
	18	NTJAL	Notice to Sheriff issued.
11/28/05	1	TXREC	Oppositon to motion to dismiss pursuant to penal code section 995 received at counter and forwarded to Harbor Justice Center.
11/30/05	1	FIOPS	Opposition papers filed on 11/30/2005.
12/02/05	1	HHELD	**Hearing held on 12/02/2005 at 08:30:00 AM in Department H12 for Motion Penal Code 995.**
	2	HHELD	**Hearing held on 12/02/2005 at 08:30:00 AM in Department H12 for Pre Trial.**
	3	OFJUD	Officiating Judge: Susanne S. Shaw, Judge
	4	OFJA	Clerk: K. Reinke
	5	OFBAL	Bailiff: B. Parenteau
	6	OFREP	Court Reporter: Karen Puckett
	7	APDDA	People represented by Ray Armstrong, Deputy District Attorney, present.
	8	APTXT	Mr. Armstrong present for motin only

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE

DOCKET REPORT

Case : 05HF1307 F A

Name : Mena, Rudy

Date of Action	Seq Nbr	Code	Text
12/02/05	9	APDDA	People represented by Jennifer Walker, Deputy District Attorney, present.
	10	APNDC	Defendant not present in Court represented by Gabriel Silvers, Retained Attorney.
	11	APDHC	Defendant remains in holding cell, not brought into courtroom.
	12	MOTION	Motion denied.
	13	CLTRM	Jury Trial for 12/05/2005 08:30 AM in H12 to remain.
	14	BLSTR	Current bail set for defendant to remain.
	15	DFREM	Defendant remanded to the custody of the Sheriff.
	16	NTJAL	Notice to Sheriff issued.
12/05/05	1	HHELD	**Hearing held on 12/05/2005 at 08:30:00 AM in Department H12 for Jury Trial.**
	2	OFJUD	Officiating Judge: Susanne S. Shaw, Judge
	3	OFJA	Clerk: J. F. Siebert
	4	OFBAL	Bailiff: B. Parenteau
	5	OFREP	Court Reporter: Karen Puckett
	6	APDHC	Defendant remains in holding cell, not brought into courtroom.
	7	APNDC	Defendant not present in Court represented by Gabriel Silvers, Retained Attorney.
	8	APDDA	People represented by Jennifer Walker, Deputy District Attorney, present.
	9	CLSET	Jury Trial trailed to 12/06/2005 at 08:30 AM in Department H12.
	10	DFREM	Defendant remanded to the custody of the Sheriff.
	11	BLSTR	Current bail set for defendant to remain.
	12	JLCVC	Court orders defendant to be brought to Court in civilian clothing.
	13	NTJAL	Notice to Sheriff issued.
12/06/05	1	HHELD	**Hearing held on 12/06/2005 at 08:30:00 AM in Department H12 for Jury Trial.**
	2	CLTXT	Cause called at 1:30 p.m.
	3	OFJUD	Officiating Judge: Susanne S. Shaw, Judge
	4	OFJA	Clerk: J. F. Siebert
	5	OFBAL	Bailiff: B. Parenteau
	6	OFREP	Court Reporter: Robyn Vanderplate
	7	APDWC	Defendant present in Court with counsel Gabriel Silvers, Retained Attorney.
	8	APDDA	People represented by Jennifer Walker, Deputy District Attorney, present.
	9	TRSTR	**This case came on regularly for trial.**
	10	FITXT	Peoples witness list filed.
	11	FITXT	Defendant Rudy Mena's witness list filed.
	12	TRTXT	Defense wants to exclude monitored phone call and counter surveillance. Cause argued. Court will have to have a 402 EC motion with the witness

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF ORANGE

DOCKET REPORT

Case : 05HF1307 F A

Name : Mena, Rudy

Date of Action	Seq Nbr	Code	Text
12/06/05	13	TRTXT	Defense wants to exclude a statement by defendant Mena, Court will exclude
	14	TRTXT	Stipulation stated for the record
	15	TRTXT	Defendants waive their presence in chambers for the interviews with prospective jurors
	16	TRIOC	In open court at 01:51 PM
	17	TRJSE	Roll call having been taken, prospective jurors were sworn for examination.
	18	TRJEX	Prospective jurors were called by the clerk to fill the jury box.
	19	TRJAP	Court read Original Information to the prospective jurors and advised them of the defendant's plea of not guilty thereto.
	20	TRVDE	Voir Dire examination commenced.
	21	TRTXT	At 2:23 p.m., Judge Shaw, all of the attorneys and the court reporter go into chambers to interview prospective jurors
	22	TRTXT	Later in the p.m., parties return into court
	23	TRVDE	Voir Dire examination resumed.
	24	TRJXC	Court excused 5 prospective juror(s) for cause.
	25	TRTXT	At 2:43 p.m., Judge Shaw, all attorneys and the court reporter go into chambers to interview prospective jurors
	26	TRTXT	Later in p.m., parties return into court
	27	TRVDE	Voir Dire examination resumed.
	28	TRJXC	Court excused 1 prospective juror(s) for cause.
	29	TRTXT	All sides pass for cause
	30	TRPEC	Peremptory challenge exercised by People.
	31	TRPEC	Peremptory challenge exercised by Defense.
	32	TRPEC	Peremptory challenge exercised by Defense.
	33	TRPEC	Peremptory challenge exercised by People.
	34	TRPEC	Peremptory challenge exercised by Defense.
	35	TRPEC	Peremptory challenge exercised by Defense.
	36	TRVDE	Voir Dire examination resumed.
	37	TRTXT	All sides pass for cause
	38	TRPEC	Peremptory challenge exercised by People.
	39	TRPEC	Peremptory challenge exercised by Defense.
	40	TRPEC	Peremptory challenge exercised by Defense.
	41	TRJYA	People accepted the jury as presently constituted.
	42	TRPEC	Peremptory challenge exercised by Defense.
	43	TRPEC	Peremptory challenge exercised by Defense.
	44	TRPEC	Peremptory challenge exercised by People.
	45	TRVDE	Voir Dire examination resumed.
	46	TRCBR	At 04:06 PM, Court and Counsel confer at bench without Court Reporter present.
	47	TRPEC	Peremptory challenge exercised by Defense.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF ORANGE

DOCKET REPORT

Case : 05HF1307 F A

Name : Mena, Rudy

Date of Action	Seq Nbr	Code	Text
12/06/05	48	TRPEC	Peremptory challenge exercised by Defense.
	49	TRJYA	Both sides accepted the jury as presently constituted.
	50	TRCBR	At 04:09 PM, Court and Counsel confer at bench without Court Reporter present.
	51	TRVDE	Voir Dire examination resumed.
	52	TRTXT	All sides pass for cause
	53	TRCBR	At 04:17 PM, Court and Counsel confer at bench without Court Reporter present.
	54	TRTXT	At 4:18 p.m., Judge Shaw, all attorneys and the court reporter go into chambers to interview prospective jurors
	55	TRTXT	Later in p.m., parties return into court
	56	TRVDE	Voir Dire examination resumed.
	57	TRCBR	At 04:19 PM, Court and Counsel confer at bench without Court Reporter present.
	58	TRJXC	Court excused 1 prospective juror(s) for cause.
	59	TRJYA	People accepted the jury as presently constituted.
	60	TRPEC	Peremptory challenge exercised by Defense.
	61	TRJYA	People and Defense accepted the jury as presently constituted.
	62	TRAJA	Both sides accepts the alternate jurors.
	63	TRIOC	In open court at 04:22 PM
	64	TRJCS	**12 jurors and 1 alternate were sworn by the clerk to hear this matter. Disposition of panel jurors is reported on the random list and included by reference.**
	65	TRCBR	At 04:24 PM, Court and Counsel confer at bench without Court Reporter present.
	66	TRRTD	At 04:25 PM, Court admonished jurors and declared a recess to reconvene on 12/07/2005 at 09:15 AM in Department H12 for Jury Trial.
	67	TROPJ	Proceedings held outside the presence and hearing of the jurors.
	68	TRTXT	Cause discussed
	69	DFREM	Defendant remanded to the custody of the Sheriff.
	70	BLSTR	Current bail set for defendant to remain.
	71	BLHTR	Court orders hold pursuant to Penal Code 1275.1 to remain.
	72	JLCVC	Court orders defendant to be brought to Court in civilian clothing.
	73	NTJAL	Notice to Sheriff issued.
	74	NTJAL	Notice to Sheriff issued.
12/07/05	1	HHELD	**Hearing held on 12/07/2005 at 09:15:00 AM in Department H12 for Jury Trial.**
	2	OFJUD	Officiating Judge: Susanne S. Shaw, Judge
	3	OFJA	Clerk: J. F. Siebert
	4	OFBAL	Bailiff: B. Parenteau
	5	OFREP	Court Reporter: Karen Puckett
	6	APDWC	Defendant present in Court with counsel Gabriel Silvers, Retained Attorney.

(949) 476-4712

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF ORANGE

DOCKET REPORT

Case : 05HF1307 F A

Name : Mena, Rudy

Date of Action	Seq Nbr	Code	Text
12/07/05	7	APDDA	People represented by Jennifer Walker, Deputy District Attorney, present.
	8	TRTXT	Court will hear 402 EC motion evidence
	10	TRWST	**Witness, Officer John Paul Topartzer, sworn and testified.**
	11	TRTXT	Court will allow the statements for the limited purpose
	12	TRWEX	Witness excused.
	13	TRRJI	Court and Counsel review jury instructions with Court Reporter present.
	14	TRIOC	In open court at 09:14 AM
	15	TRPJP	Sworn jurors are present and in their proper places.
	16	TRTXT	All other parties present as previously indicated on the record
	17	TRTXT	Court reads caljic.50 to the jurors
	18	TROSB	Opening statement by People given.
	19	TROSB	Opening statement by Defense given.
	20	TROSB	Opening statement by Defense given.
	21	TRWST	**Witness, Officer John Paul Topartzer, sworn and testified.**
	22	TREXI	**People's Exhibit # 1 brown box with contents (contents were the drugs and packaging) marked for identification.**
	23	TREXI	**People's Exhibit # 2 Pay/owe sheet marked for identification.**
	24	TRREC	At 10:29 AM, court declared a recess.
	25	TRTXT	Witness steps down
	26	TRALP	Again in open court at 10:40 AM, Defendant present with counsel. People duly represented. Sworn Jurors present in their proper places.
	27	TRWRT	Officer John Paul Topartzer, previously sworn, resumes testimony.
	28	TRWEX	Witness excused.
	29	TRWST	**Witness, Officer James Schoales, sworn and testified.**
	30	TRWEX	Witness excused.
	31	TRWST	**Witness, Officer Michael Patrick Reilly, sworn and testified.**
	32	TREXI	**People's Exhibit # 3 copy of documents found in home marked for identification.**
	33	TREXI	**People's Exhibit # 4 phone book in a plastic bag marked for identification.**
	34	TRWEX	Witness excused.
	35	TREXI	**People's Exhibit # 5 stipulation marked for identification.**
	36	TREXI	**People's Exhibit # 6 stipulation marked for identification.**
	37	TRTXT	Stipulations were titled Huntington Beach Police Department Supplementary & Follow-Up Report
	38	TRTXT	Stipulations read to the jury
	39	TRCBR	At 11:29 AM, Court and Counsel confer at bench without Court Reporter present.
	40	TRREC	At 11:30 AM, court declared a recess.
	41	TROPJ	Proceedings held outside the presence and hearing of the jurors.
	42	TRTXT	Court goes over the defendants decision not to testify.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF ORANGE

DOCKET REPORT

Case : 05HF1307 F A

Name : Mena, Rudy

Date of Action	Seq Nbr	Code	Text
12/07/05	43	TRALP	Again in open court at 11:40 AM, Defendant present with counsel. People duly represented. Sworn Jurors present in their proper places.
	44	TRPRS	People rest.
	45	TRDRS	Defense rests.
	46	TRREC	At 11:41 AM, court declared a recess.
	47	TRALP2	Again in open court at 01:30 PM, Defendant present with counsel. People duly represented.
	48	TRRJI	Court and Counsel review jury instructions with Court Reporter present.
	49	TRIOC	In open court at 01:40 PM
	50	TRPJP	Sworn jurors are present and in their proper places.
	51	TREXA	**People's Exhibits # 1 through 6 received into evidence.**
	52	TRCLA	Closing argument presented on behalf of the People.
	53	TRCLA	Closing argument presented on behalf of the Defense.
	54	TRREC	At 02:40 PM, court declared a recess.
	55	TRALP	Again in open court at 02:45 PM, Defendant present with counsel. People duly represented. Sworn Jurors present in their proper places.
	56	TRCLA	Closing argument presented on behalf of the Defense.
	57	TRRBA	Rebuttal argument presented on behalf of the People.
	58	TRCRI	The Court read the Instructions to the Jury.
	59	TRJRT	At 03:53 PM, the Jury retired to the jury room to deliberate in charge of Deputy B. Parenteau duly sworn for that purpose.
	60	TRTXT	3 photos substituted in for Peoples exhibit 1. The original exhibit to be returned to the officer
	61	TRRTD	At 04:35 PM, Court admonished jurors and declared a recess to reconvene on 12/08/2005 at 08:30 AM in Department H12 for Jury Trial.
	62	DFREM	Defendant remanded to the custody of the Sheriff.
	63	BLSTR	Current bail set for defendant to remain.
	64	JLCVC	Court orders defendant to be brought to Court in civilian clothing.
	65	NTJAL	Notice to Sheriff issued.
12/08/05	1	HHELD	**Hearing held on 12/08/2005 at 08:30:00 AM in Department H12 for Jury Trial.**
	2	OFJUD	Officiating Judge: Susanne S. Shaw, Judge
	3	OFJA	Clerk: J. F. Siebert
	4	OFBAL	Bailiff: B. Parenteau
	5	OFREP	Court Reporter: Karen Puckett
	6	APTXT	No appearance by any parties at this time
	7	TRJRD	At 08:34 AM, jurors returned to the jury room to resume deliberations.
	8	TRIOC	In open court at 11:10 AM
	9	APDWC	Defendant present in Court with counsel Gabriel Silvers, Retained Attorney.
	10	APDDA	People represented by Jennifer Walker, Deputy District Attorney, present.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE

DOCKET REPORT

Case : 05HF1307 F A

Name : Mena, Rudy

Date of Action	Seq Nbr	Code	Text
12/08/05	11	APTXT	All other parties present as indicated on the minute order
	12	FDJGC	VERDICT: We the jury in the above entitled action find the defendant GUILTY as to count 1 as charged in the Original Information. Juror # 9, Foreperson. Verdict read, filed, and incorporated herein by reference.
	14	FDJOT	FINDING: We the jury in the above-entitled action FIND IT TO BE X TRUE that the defendant sold or possessed for sale a quantity of 57 grams or more of a substance containing cocaine within the meaning of 1203.073(b)(1) PC. /s/ Juror # 9, Foreperson. Finding read, filed, and incorporated hereby in reference.
	15	TRJPL	To the question, "Ladies and gentlemen of the jury are these your verdict(s) and finding(s)?" the jury answered in the affirmative. The jury was polled by the clerk. To the question: "Are these your verdict(s) and finding(s)?" each of the jurors answered individually in the affirmative. The clerk was ordered to record the verdict(s).
	16	TRJTE	Court thanked and excused the Jury.
	17	TRJID	The jury instructed to disregard portions of testimony which were stricken.
	18	TRAEX	Alternate juror(s) notified by telephone and excused.
	19	CLSET2	Sentencing re: Probation and Sentencing set on 01/20/2006 at 08:00 AM in Department H12.
	20	WVTIM	Defendant waives statutory time for Sentencing.
	21	PBRPO	Probation Department ordered to prepare a Probation & Sentencing report to be made available to court and counsel 5 days prior to Sentencing.
	22	DFREM	Defendant remanded to the custody of the Sheriff.
	23	BLSTR	Current bail set for defendant to remain.
	24	BLHTR	Court orders hold pursuant to Penal Code 1275.1 to remain.
	25	NTJAL	Notice to Sheriff issued.
	26	FITXT	Single party exhibit list (People) filed.
	27	FITXT	Clean copy jury instructions filed.
	28	FITXT	2 copies of the signed verdict forms filed.
	29	FITXT	2 copies of the signed finding forms filed.
	30	FITXT	2 unsigned finding forms filed.
	31	FITXT	6 unsigned verdict forms filed.
	32	FITXT	Confidential envelope containing jury information filed.
	33	FITXT	Refused/Withdrawn jury instructions filed.
	34	FITXT	Given jury instructions filed.
	35	TRACD	**Actual days of trial: 3 days.**
12/09/05	1	FIDOC	Exhibit List of People filed.
01/20/06	1	HHELD	**Hearing held on 01/20/2006 at 08:00:00 AM in Department H12 for Sentencing Probation and Sentencing.**
	2	OFJUD	Officiating Judge: Susanne S. Shaw, Judge
	3	OFJA	Clerk: J. Barrera
	4	OFBAL	Bailiff: B. Parenteau
	5	OFREP	Court Reporter: Bernadette Balajadia

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE

DOCKET REPORT

Case : 05HF1307 F A

Name : Mena, Rudy

Date of Action	Seq Nbr	Code	Text
01/20/06	6	APDDA	People represented by Jennifer Walker, Deputy District Attorney, present.
	7	APDWRA	Defendant present in Court with counsel Slater, David M, Retained Attorney.
	8	CPGTO	Copy of Pre Sentence Report given to counsel.
	9	WVTIM	Defendant waives statutory time for Sentencing.
	12	SPSP1	No legal cause why judgment should not be pronounced and defendant having been convicted of 11351 HS as charged in count 1, defendant is sentenced to STATE PRISON for Middle term of 3 Year(s).
	13	SPCTS	Credit for time served: 174 actual, 87 conduct, totaling 261 days.
	14	SPTXT	Court suspends allegation.
	15	SESRF	Pay $200.00 Restitution Fine pursuant to Penal Code 1202.4 or Penal Code 1202.4(b).
	16	SESEC	Pay $20.00 for Security Fee pursuant to Penal Code 1465.8.
	17	SPRFS	Pay $200.00 Parole Revocation Restitution Fine pursuant to Penal Code 1202.45. Parole Revocation Restitution Fine suspended unless parole is revoked.
	18	SPFDC	Court orders all fees payable through the Department of Corrections.
	19	SEDNA	Defendant to submit to DNA testing pursuant to Penal Code 296.
	20	SPJUD	The reason Court pronounced judgment in this matter is as follows: as stated on the record.
	21	SPDDD	Sheriff ordered to deliver the defendant to the custody of the Department of Corrections, Reception Center.
	22	DFREM	Defendant remanded to the custody of the Sheriff.
	23	NTJAL	Notice to Sheriff issued.
	24	DMABS	DD1-J sent to DMV. Return Code: 800
01/22/06	1	DOJABS	DOJ Initial Abstract sent.
01/30/06	1	FITXT	Abstract of Judgment - Prison Commitment - Determinate filed.
	2	TEXT	State Prison packet forwarded to Orange County Jail Commitment Clerk

LAW OFFICES OF ANDRES Z. BUSTAMANTE

ANDRÉS Z. BUSTAMANTE
ATTORNEY AT LAW
634 SOUTH SPRING STREET SUITE 910
LOS ANGELES, CALIFORNIA 90014

Phone (213)891-9009 Fax (213)627-1655

Gabriel David Silvers
7901 E. Alvin Rd.
Tucson, AZ 85750

December 3, 2007

Re: Rudy Mena
People v. Rudy Mena, Case No. 05HF1307

Dear Mr. Silvers:

I represent Rudy Mena in an immigration matter. It is my understanding that you represented Mr. Mena during the above-referenced proceedings. Due to his conviction for a violation of Health & Safety Code §11351, Possession for Sale of a Controlled Substance, the Department of Homeland Security is attempting to remove Mr. Mena to Mexico.

Your responses to the following questions would greatly assist Mr. Mena in his immigration matter.

1. Did you ever discuss with Mr. Mena whether he wished to file an appeal after his conviction?

2. Did Mr. Mena ever tell you whether or not he wished to file an appeal of his conviction?

3. What advice did you give Mr. Mena regarding the procedure for an appeal?

4. What were Mr. Mena's concerns regarding an appeal?

Thank you in advance for your time and consideration. Should you have any questions about this matter, please do not hesitate to contact my office.

Sincerely,

Keli M. Reynolds
Counsel for Rudy Mena

5

Rudy Mena
A# 92-878-235
1115 North Imperial Avenue
El Centro, CA 92243

Gabriel David Silvers, Attorney at Law
8749 Holloway Dr.
West Hollywood 90069

Dated: March 4, 2008

Dear Mr. Silvers,

On July 29, 2005, I was arrested and charged of violation of Health & Safety Code § 11351, Possession for sale of Controlled Substance. On December 8 , 2005, I was convicted by jury trial on one count of Possession for sale, and on January 20, 2006, I was sentenced to (3) years in state prison. You were representing me during all my Court proceedings to the trial. After I was paroled from state prison I was picked by the Department of Homeland Security (DHS) and was ordered to be deported to My Country Mexico. Mr. Silvers, your responses to the following questions would greatly assist me in my Immigration Matter:

1. Why you did not discuss with me about my right to appeal after I was convicted by the jury trial.
2. Why you did not advice me about the right of appeal, and that if I did not appeal I will be subject to Immigration consequences, and that I could be deported, excluded from entering the United States, and be separated from my aging mother.
3. Why you did not file an appeal of the conviction of the Jury trial.
4. Why you did not file any motions to challenge the probable cause and to unseal part of the search warrant.
5. Why you did not construct the jury about less charges and the elements of possession for sale.
6. Why you did not seek from the trial court about sua sponte construction to construct the jury of less charges and about the elements of possession for sale.
7. Why you did not file any motion to seek from the sentence Judge about less sentence to avoid any of Immigration consequences.
8. Why you did not advice the Trial Court that this is my first ever drug related case, and that I should be eligible for drug treatment program.

Mr. Silvers, the Immigration Judge ordered me to be deported from the United States, and he excluded me from the return to this Country for the rest of my life, I appealed the Judge's decision, my case now is pending in the Court of Appeals for the Ninth Circuit.

Sincerely Yours,

Rudy Mena

Rodolfo Herrera-Mena
PLAINTIFF/PETITIONER/MOVANT'S NAME

A# 92-878-235
PRISON NUMBER

BICE - El Centro Detention Center
1115 N. Imperial Ave.
El Centro, CA 92243

ADDRESS

United States District Court
Southern District Of California

Rodolfo Herrera-Mena, Plaintiff/Petitioner/Movant

v.

Michael Chertoff, et al., Defendant/Respondent

Civil No. ______________________
(TO BE FILLED IN BY U.S. DISTRICT COURT CLERK)

MOTION AND DECLARATION UNDER PENALTY OF PERJURY IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Rodolfo Herrera-Mena
declare that I am the Plaintiff/Petitioner/Movant in this case. In support of my request to proceed without prepayment of fees or security under 28 U.S.C. § 1915, I further declare I am unable to pay the fees of this proceeding or give security because of my poverty, and that I believe I am entitled to redress.

In further support of this application, I answer the following question under penalty of perjury:

1. Are you currently incarcerated? (Yes) No (If "No" go to question 2)
   If "Yes," state the place of your incarceration . El Centro Processing Center
   Are you employed at the institution? (Yes) No
   Do you receive any payment from the institution? (Yes) No
   [Have the institution fill out the Certificate portion of this affidavit and attach a certified copy of the trust account statement from the institution of your incarceration showing at least the last six months transactions.]

2. Are you currently employed? ☐ Yes ☒ No

   a. If the answer is "Yes," state the amount of your take-home salary or wages and pay period and give the name and address of your employer.

   ____

   b. If the answer is "No" state the date of your last employment, the amount of your take-home salary or wages and pay period and the name and address of your last employer.

   I.M.C. Financial Group / City of Santa Ana I used to make $ 3,500.00 a month. 2005.

3. In the past twelve months have you received any money from any of the following sources?:

   a. Business, profession or other self-employment ☐ Yes ☒ No
   b. Rent payments, royalties interest or dividends ☐ Yes ☒ No
   c. Pensions, annuities or life insurance ☐ Yes ☒ No
   d. Disability or workers compensation ☐ Yes ☒ No
   e. Social Security, disability or other welfare ☐ Yes ☒ No
   e. Gifts or inheritances ☐ Yes ☒ No
   f. Spousal or child support ☐ Yes ☒ No
   g. Any other sources ☐ Yes ☒ No

   If the answer to any of the above is "Yes" describe each source and state the amount received and what you expect you will continue to receive each month.

   ____

4. Do you have any checking account(s)? ☐ Yes ☒ No

   a. Name(s) and address(es) of bank(s): ______________________________
   b. Present balance in account(s): ______________________________

5. Do you have any savings/IRA/money market/CDS' separate from checking accounts? ☐ Yes ☒ No

   a. Name(s) and address(es) of bank(s):
   b. Present balance in account(s):

6. Do you own an automobile or other motor vehicle? ☐ Yes ☒ No

   a. Make: Year: Model:
   b. Is it financed? ☐ Yes ☐ No
   c. If so, what is the amount owed?

7. Do you own any real estate, stocks, bonds, securities, other financial instruments, or other valuable property?
   [ ] Yes [X] No
   If "Yes" describe the property and state its value.______________________________

8. List the persons who are dependent on you for support, state your relationship to each person and indicate how much you contribute to their support.

   My mother, she send me little amount of money monthly, $60-100 , enough to by me my needs and phone cards.

9. List any other debts (current obligations, indicating amounts owed and to whom they are payable):

   N / A

10. List any other assets or items of value (specify real estate, gifts, trusts inheritances, government bonds, stocks, savings certificates, notes, jewelry, artwork, or any other assets [include any items of value held in someone else's name]):

    N / A

11. If you answered all of the items in #3 "No," and have not indicated any other assets or sources of income anywhere on this form, you must explain the sources of funds for your day-to-day expenses.

    I work at the facility, 2 days / week for $ 1.00 / day to help me to support my needs from hygiene to phone cards

I declare under penalty of perjury that the above information is true and correct and understand that a false statement herein may result in the dismissal of my claims.

DATE **March 10, 2008** ______________________ SIGNATURE OF APPLICANT

If you are a prisoner you must have an officer from your institution provide this official certificate as to the amount of money in your prison account. There are no exceptions to this requirement.

PRISON CERTIFICATE
(Incarcerated applicants only)
(To be completed by the institution of incarceration)

I certify that the applicant Rodolfo Herrera-Mena,
(NAME OF INMATE)

A# 92-878-235,
(INMATE'S CDC NUMBER)

has the sum of $__________ on account to his/her credit at __________

__________.
(NAME OF INSTITUTION)

I further certify that the applicant has the following securities __________

to his/her credit according to the records of the aforementioned institution. I further certify that during the past six months the applicant's *average monthly balance* was $ 340.00 US Dllrs,

and the *average monthly deposits* to the applicant's account was $ 100 —.

ALL PRISONERS *MUST* ATTACH A CERTIFIED COPY OF THEIR TRUST ACCOUNT STATEMENT SHOWING TRANSACTIONS FOR THE SIX-MONTH PERIOD IMMEDIATELY PRECEDING THE FILING OF THE COMPLAINT PER 28 U.S.C. § 1915(a)(2).

03-09-08
DATE

[signature]
SIGNATURE OF AUTHORIZED OFFICER OF INSTITUTION

Sergio M. Gonzalez
OFFICER'S FULL NAME (PRINTED)

SIEA
OFFICER'S TITLE/RANK

TRUST ACCOUNT WITHDRAWAL AUTHORIZATION
(Incarcerated applicants only)

(This form MUST be completed by the prisoner requesting to proceed in forma pauperis. An incomplete "Trust Account Withdrawal Authorization Form," or "Prison Certificate" will result in automatic denial of the prisoner's request to proceed in forma pauperis.)

I, Rodolfo D. Mena 92-878-235, request and authorize the agency holding me in
(Name of Prisoner/ CDC No.)

custody to prepare for the Clerk of the United States District Court for the Southern District of California, a certified copy of the statement for the past six months of my trust fund account (or institutional equivalent) activity at the institution where I am incarcerated.

I further request and authorize the agency holding me in custody to calculate and disburse funds from my trust fund account (or institutional equivalent) pursuant to any future orders issued by the Court relating to this civil action pursuant to the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, Title VIII, §§ 801-10, 110 Stat. 1321 (1996).

This authorization is furnished in connection with a civil action filed in the Southern District of California, and I understand that, pursuant to 28 U.S.C. §§ 1914 and 1915(b)(1), the total amount of filing fees for which I am obligated is either ☐ $150 (civil complaint) or ☐ $5 (habeas corpus petition) (check one). I also understand that this fee will be debited from my account regardless of the outcome of this action. This authorization shall apply to any other agency into whose custody I may be transferred.

DATE 03-10-08 [signature] SIGNATURE OF PRISONER

JS44
(Rev. 07/89)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

FILED
MAR 14 2008
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

I (a) PLAINTIFFS

Rodolfo Herrera-Mena

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Imperial
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

Chertoff, et al

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Rodolfo Herrera-Mena
1115 N. Imperial Avenue
El Centro, CA 92243
A92-878-235

ATTORNEYS (IF KNOWN)

'08 CV 0481 J LSP

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX (For Diversity Cases Only) FOR PLAINTIFF AND ONE BOX FOR DEFENDANT

	PT	DEF		PT	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

28 USC 2241

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment &Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153Recovery of Overpayment of Veterans Benefits
- ☐ 160 Stockholders Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectmant
- ☐ 240 Tort to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury- Medical Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/Accommodations
- ☐ 444 Welfare
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence Habeas Corpus
- ☐ 530 General
- ☐ 535 Death Penalty
- ☒ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prisoner Conditions

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC881
- ☐ 630 Liquor Laws
- ☐ 640 RR & Truck
- ☐ 650 Airline Regs
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt. Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (13958)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS - Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reappointment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce/ICC Rates/etc.
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities Exchange
- ☐ 875 Customer Challenge 12 USC
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900 Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State
- ☐ 890 Other Statutory Actions

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

☒ 1 Original Proceeding ☐ 2 Removal from State Court ☐ 3 Remanded from Appelate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23 **DEMAND $** Check YES only if demanded in complaint: **JURY DEMAND:** ☐ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See Instructions): JUDGE Docket Number

DATE 3/14/2008 ~~SIGNATURE OF ATTORNEY OF RECORD~~

#148820 ~~$350~~ $5.00 KO 3/17/08

RMH

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

# 148820 - KD
*** * C O P Y * ***
March 17, 2008
11:27:30

Habeas Corpus
USAO #.: 08CV0481
Amount.: $5.00 MO
Check#.: MO 12358051874

Total-> $5.00

FROM: HABEAS CORPUS
HERRERA-MENA V. CHERTOFF, EA
08CV0481